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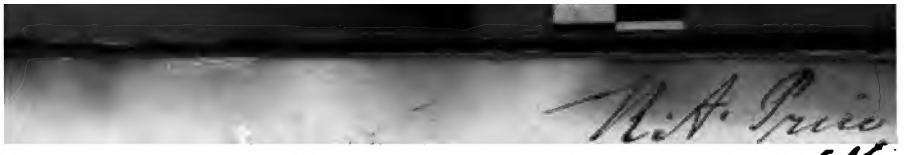

Middle Temple

REPORTS

OF

CASES

ADJUDGED IN THE

Court of King's Bench:

WITH SOME

SPECIAL CASES

IN THE

Courts of Chancery, Common Pleas, and Exchequer,

ALPHABETICALLY DIGESTED UNDER PROPER HEADS;

From the First Year of King WILLIAM and Queen MARY, to the Tenth Year of Queen ANNE.

By WILLIAM SALKELD,
LATE SERJEANT AT LAW.

THE SIXTH EDITION:

Including the NOTES and REFERENCES of KNIGHTLEY D'ANVERS, Esq. and Mr. Serjeant WILSON;

And large Additions of NOTES and REFERENCES to Modern Authorities and Determinations,

By WILLIAM DAVID EVANS, Esq.
BARRISTER AT LAW.

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1795.

A

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Law Common, Canon, Civil, &c.

1. Blankard *verſus* Galdy.

[Trin. 5 W. & M. B. R. Intr. Paſ. 3. W. & M. Rot. 35.]

S. C. 4 Mod. 215, 222, 223, &c. See the Pleadings. Ibid. Comb. 228. Holt 341.

IN *debt* on a bond, the defendant prayed *oyer* of the condition, and pleaded the ſtatute *E.* 6. againſt buying offices concerning the adminiſtration of juſtice; and averred, That this bond was given for the purchaſe of the office of provoſt-marſhal in *Jamaica*, and that it concerned the adminiſtration of juſtice, and that *Jamaica* is part of the revenue and poſſeſſions of the Crown of *England*: The plaintiff replied, that *Jamaica* is an iſland beyond the ſeas, which was conquered from the *Indians* and *Spaniards* in Q. *Elizabeth*'s time, and the inhabitants are governed by their own laws, and not by the laws of *England*: The defendant rejoined, That before ſuch conqueſt they were governed by their own laws; but ſince that, by the laws of *England*: *Shower* argued for the plaintiff, that, on a judgment in *Jamaica*, no writ of error lies here, but only an appeal to the Council; and as they are not repreſented in our parliament, ſo they are not bound by our ſtatutes, unleſs ſpecially named. *Vide And.* 115. *Pemberton contra* argued, that by the conqueſt of a nation, its liberties, rights, and properties are quite loſt; that by conſequence their laws are loſt too, for the law is but the rule and guard of the other; thoſe that conquer, cannot by their victory loſe their laws, and become ſubject to others. *Vide Vaugh.* 405. That error lies here upon a judgment in *Jamaica*, which could not be if they were not under the ſame law. *Et per Holt*, C. J. *& Cur.*,

Where an uninhabited country is found out and planted by Engliſh ſubjects, all laws in force here are immediately in force there; but in the caſe of an inhabited country conquered, not till declared ſo by the conqueror. Vide 3 Keb. 401, &c. 2 And. 116. 4 Leon. 61. 7 Co. Calvin 23. Vaugh. 279. &c. 2 Vent. 4. Poſt. 666. Comber. 228, 229. 2 Mod. 45. 2 Wms. 75. Sho. Parl. Ca. 31. 1 Bl. Com. 105.

1ſt, In caſe of an uninhabited country newly found out by *Engliſh* ſubjects, all laws in force in *England* are in force there; ſo it ſeemed to be agreed.

2dly, *Jamaica* being conquered, and not pleaded to be parcel of the kingdom of *England*, but part of the poſ-

Vide Cowp. 208. 4 Bur. 2100. Doug. 38.

ſeſſions and revenue of the Crown of *England*, the laws of *England* did not take place there, until declared ſo by the conqueror or his ſucceſſors. The *Iſle of Man* and *Ireland* are part of the poſſeſſions of the Crown of *England*; yet retain their ancient laws: * That in *Davis* 36. it is not pretended, that the cuſtom of *taniſtry* was determined by the conqueſt of *Ireland*, but by the new ſettlement made there after the conqueſt: That it was impoſſible the laws of this nation, by mere conqueſt, without more, ſhould take place in a conquered country; becauſe, for a time, there muſt want officers, without which our laws can have no force: That if our law did take place, yet they in *Jamaica* having power to make new laws, our general laws may be altered by theirs in particulars; alſo they held, that in the caſe of an infidel country, their laws by conqueſt do not entirely ceaſe, but only ſuch as are againſt the law of God; and that in ſuch caſes where the laws are rejected or ſilent, the conquered country ſhall be governed according to the rule of natural equity. Judgment *pro quer'*.

Poſt. 510.
5 Mod. 187.

Vide Poſt. 672.

2. Matthew *verſus* Burdett.

[Hill. 1 Ann. B. R.]

2 Stran. 1057. Canons oblige not the laity without the conſent of the civil legiſlative power. Vide Hale's Hiſt. of the Law, pag. 23 to 33. 12 Co. 72. 2 Inſt. 57, 647, 653, 657. 2 Rol. Abr. 226, 4:4

IN the primitive church, the laity were preſent at all ſynods: When the empire became Chriſtian, no canon was made without the emperor's conſent: The emperor's conſent included that of the people, he having in himſelf the whole legiſlative power, which our kings have not: Therefore, if the king and clergy make a canon, it binds the clergy *in re eccleſiaſtica*, but it does not bind laymen; they are not repreſented in convocation; their conſent is neither aſked nor given.

Mo. 782. Br. Ordinary 1. 2 Cro. 670. 2 Brownl. 38. Cro. Car. 588. Palm. 379. 3 Salk. 318. S. C. 2 Vent. 44. 2 Lev. 222. 2 Inſt. 97. Caſes in B. R. Tempore Lord Hardwicke 57, 326, 395. 1 Bl. Com. 82.

Leaſes.

2 Show. 31.

1. Haths *verſus* Aſh.

[Trin. 8 W. 3. C. B.]

A Leaſe to commence *a datu*, includes the day of the date. Adjudged by three judges againſt *Treby*, C. J. But note, *a die datus* excludes the day (*a*). *Vide* 5 *Co.* 1. 94 *B.* 2 *Co.* 55. 2 *Bulſt.* 83, 305. 3 *Bulſt.* 203. *Aleyn* 77. *Ray.* 84.

Commencement a datu. Vide poſt. 625, 627. 1 Salk. 44. 2 Mod 215. 6 Mod. 260. 3 Lev. 438.

5 Co. 21, 100. Cro. Jac. 258, 18, called Hatter ver. Aſhe. Al. 77. 1 Rol. R. 8, 3. 1 Wilſon 176. 2 Ib. 165. 2 Ld. Ray. 1242.

(*a*) *R.* in the caſe of *Pugh* and the Duke of *Leeds*, *Cowp.* 714., that a leaſe to commence from the day of the date is good, under a power to grant leaſes in poſſeſſion only, and not in reverſion. The caſe has been ſince adopted as a ruling deciſion, that *from any time* is to be conſtrued excluſively or incluſively, as may beſt effectuate the act intended to be done by the parties. *Vide* 5 *T. R.* 286.

2. Stomfil *verſus* Hicks.

[Mich. 9 Will. 3. C. B. 1 Ld. Raym. 280. S. C.]

A. Leaſes to *B.* for a year, and from year to year as long as it ſhall pleaſe both parties. Adjudged that this is a leaſe for two years, and afterwards at will; and ſo it was ruled *inter Bellaſis* and *Burbrich*. *Hill.* 8 *W.* 3. *C. B.* *Vide infra*, *pl.* 4. *contra*, and *pl.* 6 (*a*).

Leaſe for a year, and ſo from year to year, quamdiu, &c. Vide poſt. pl. 6. Holt 414. S. C. 1 Will. 262.

3. *A.* poſſeſſed of a term for 100 years, grants the land, *habendum* for 40 years, to commence after his death. This is a good new leaſe; and if *H.* poſſeſſed of a term for 20 years, grants the tenements for nineteen years, to commence after his death, this will be good for ſo much of the twenty years as ſhall be unexpired at the time of his death. Ruled by *Holt*, C. J. at Lent aſſizes at *Dorcheſter*, 10 *W.* 3. *Gree* verſus *Studley*. Cro. Jac. 71. 6 Co. 36. 1 Lev. 35

Termor for years grants for a leſs term, to commence after his death, good. 1 Sid. 359. 1 Mod. 4. 1 Lutw. 213, 214. Alleyn 4. Cro. El. 775.

4. If *A.* demiſe lands to *B.* for a year, and ſo from year to year, this is not a leaſe for two years, and afterwards

Leaſe for a yea and ſo from year to year, quamdiu

(*a*) *S. C. Lut.* 313. *quod vide*: *Vide* alſo ſome obſervations on the point as here ſtated. 1 *T. R.* 380.

diu, &c., what it is, and when it may be determined. Vide prox. p. When leſſor or leſſee at will may determine his will. Vide infra.

at will; but it is a leaſe for every particular year, and after the year is begun, the defendant cannot determine the leaſe before the year is ended. But in a leaſe at will, the defendant may determine his will after payment of his rent, at the end of a quarter, but not the beginning, leſt the leſſor ſhould loſe his rent (*a*). The leſſor cannot determine his will in the middle of a quarter, without permitting the tenant to have the emblements. Ruled by *Holt*, C. J. at Summer aſſizes at *Lincoln*, 1699 (*b*).

(*a*) Cited 4 *T. R* 630.

(*b*) Courts of law have of late years leaned as much as poſſible againſt conſtruing demiſes, where no certain term is mentioned, to be tenancies at will; but have rather held them to be tenancies from year to year, ſo long as both parties pleaſe, eſpecially where an annual rent is reſerved. 2 *Bl. Com.* 147. In *Timmins* v. *Rowlinſon*, 3 *Bur.* 1601, 1609., it is ſaid, *per Curiam*, that leaſes at will, in the ſtrict legal notion of a leaſe at will, exiſt now only notionally: upon which Mr. *Hargreave* remarks, that he preſumes the obſervation means not that eſtates at will may not ariſe now as well as formerly, but only that it is no longer uſual to create ſuch eſtates by expreſs words, and that judges incline ſtrongly againſt implying them. Note 3 to *Co. Lit.* 55. *a.*, *Roe ex dem. Bree* v. *Lees*, 2 *Bl. Rep.* 1171. Where lands, the greateſt part whereof were enclosed, but ſome were in an open common field, were taken generally by parol at an annual rent, and a cuſtom was proved in the pariſh, that when any tenant took a farm, in which there was any open field land, more or leſs, for an uncertain term, it was conſidered as a holding from three years to three years. This was ruled to be a tenancy from year to year, and the cuſtom was deemed invalid. Lord Ch. J. *De Grey* ſaid, All leaſes for an uncertain term are, *primâ facie*, leaſes at will; it is the reſervation of an annual rent that turns them into leaſes from year to year: it is poſſible that cuſtom may make them leaſes for a longer term, as where the crop (as of liquorice or madder) does not come to perfection in leſs than two years; and I will not ſay that the nature of the ground, or the courſe of huſbandry, may not deſerve to be conſidered when ſuch a caſe comes nakedly before the Court. The intereſt of tenant from year to year devolves upon his executors or adminiſtrators. *Doe ex dem. Shore* v. *Potter*, 3 *T. R.* 15. The tenancy can only be determined at the end of a year, and upon giving a full half-year's notice. *Right ex dem. Flower* v. *Darby*, 1 *T. R.* 159. vide *Parker ex dem. Walker* v. *Conſtable*, 3 *Wilſ.* 25. When any ſuch tenancy has commenced, it continues againſt any perſon to whom the leſſor may afterwards grant the reverſion, *Birch* v. *Wright*, 1 *T. R.* 378.; or any perſon to whom it may come, though an infant. *Madden ex dem. Baker* and others v. *White*, 2 *T. R.* 159. If tenant for life demiſe for years and die, and the reverſioner permit the under-tenant to continue in poſſeſſion, and receive the rent from him according to the terms of the leaſe, it is evidence of an agreement that the tenant ſhall continue to hold from year to year, from the day, and according to the terms, of the original demiſe. *Roe* v. *Ward*, 1 *Hen. Bl.* 97. On an agreement to let a farm, to hold part from the 13th February, another part from the 5th April, and the remainder from the 12th May, and to pay rent at Old Lady-day, (5th April,) and old Michaelmas, the tenancy of the whole is ſubſtantially from Old Lady-day; and notice ſix months before that day to quit on the days of entry is ſufficient. *Doe ex dem. Daggett* v. *Snowden*, 2 *Bl.* 1224. Where an agreement for a longer term than three years is made by parol, which is void as to the duration of the term, there is a tenancy from year to year regulated in

in every other reſpect by the agreement. *Doe ex dem. Rigge* v. *Bell*, 5 *T. R.* 471. The time for giving notice may be different from half a-year, by agreement, or the cuſtom of particular places, *ſemble*, *Timmins* v. *Rowlinſon*, *Doe* v. *Snowden*, *ubi ſup. Butl. no.* to *Co. Litt.* 270. *b.* *Vide Oakapple* v. *Capous*, 4 *T. R.* 451. 5 *T. Rep. Per Buller*, J. *Lanc.* Lent aſſizes 1790, on notices to quit, if no time of entry appear, the cuſtom of the country ſhall be, *primâ facie*, evidence; if there is no ſuch cuſtom, the rent-days ſhall be deemed the day of entry; if there are two rent-days, the plaintiff's notice ſhall be preſumed right, until the defendant prove it to be wrong; and if the tenant enters about the uſual day, the entry ſhall relate to ſuch day. *Vide Eſpin. N. P.* 401 *b.*

5. Leighton *verſus* Theed.

[Hill. 13 W. 3. B. R. 1 Ld. Raym. 707. S. C.]

When leſſor or leſſee at will may determine his will. Vide ſupra & prox. p. Vide Co. Lit. 55. b.

IF *H.* holds land at will, rendering rent quarterly, the leſſor may determine his will when he pleaſes; but if he determines it within a quarter, he ſhall loſe the rent which ſhould * have been paid for that quarter in which he determines it. So the leſſee may determine it when he pleaſes, but then he muſt pay the quarter's rent. *Per Holt*, C. J. (*a*).

* [414]

(*a*) *Vide Butl. Co. Lit.* 270. *b. n.* 1.

6. Legg *verſus* Strudwick.

[Hill. 7 Ann. B. R.]

Parol demiſe to hold from year to year, & ſic ultra quamdiu, &c., is a leaſe for two years, and after every ſubſequent year begun, not determinable till that be ended. See p. 413. 1 Mod. 4. 1 Lutw. 213, 214 Rep. A. C. 203. S. C. 1 Ld. Raym. 417. And not void by the ſtatute of frauds.

IN *replevin* the defendant avowed, for that he being ſeiſed in fee of the *locus in quo*, demiſed the ſame to *A.*, *habendum de anno in annum & ſic ultra quamdiu ambabus partibus placeret*, to commence from *Lady-day* 1703, rendering an annual rent, payable quarterly. The leſſee entered, and died the 17th of *December* 1706. And the rent for a year and a half ending at *Chriſtmas* before was arrear, for which the leſſor entered and diſtrained. To this the plaintiff demurred. *Et per Curiam* it was held, firſt, That after the two years, the leſſor or leſſee might determine; but if the leſſee held on, he was not then tenant at will, but for a year certain; for his holding on muſt be taken to be an agreement to the original contract (*a*), and in execution of it; and the firſt contract was from year to year. 2dly, The third year is not in the nature of a diſtinct intereſt, becauſe it ariſes from the ſame executory contract, and therefore the leſſor may diſtrain the third year for the rent

(*a*) *R. acc.* 1 *T. R.* 378. *Vide* 3 *T. R.* 16. *Rep. B. R. Temp. Hard.* 305. *Doug.* 378. 1 *Wilſ.* 262.

of the ſecond; and ſuch an executory contract as this is not void by the ſtatute of frauds, though it be for more than three years, becauſe there is hereby no term for above two years ever ſubſiſting at the ſame time; and there can be no fraud to a purchaſer, for the utmoſt intereſt that can be to bind him, can be only one year. And *Holt*, C. J. cited this caſe *coram Hale*, C. J. A compoſition was agreed upon between the parſon and his pariſhioners for tithes *quamdiu ambabus partibus placuerit*. If the pariſhioner ploughs and ſows, the parſon ſhall not that year recede, and demand tithe in kind, but muſt make his election at the beginning of the next year; for the pariſhioner would not perhaps have ſowed his land, but that he relied upon his contract. *Cro. El.* 775. *Keilw.* 65. *Alleyn* 4. 2 *Jon.* 5. 1 *Sid.* 359. 14 *H.* 8. 10.

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[415]

Vide poſt 464, 508, 547.

Legacy.

1. Ewer *verſus* Jones.

[Mich. 2 Ann. B. R.]

Action lies for a legacy deviſed out of land. See 2 Show. 36, 37. 1 Chan. Caſes 57, 257, 258. 1 Ch. Rep. 134, 218, & prox. pag. Mod. Caſes 26. 6 Mod. 26. Holt 419. S. C. 2 Ld. Raym. 937. S. P. 3 Salk. 227. S. C. not S. P.

IT was held by *Holt*, C. J. clearly, that a deviſee may maintain an action at common law againſt a tertenant for a legacy deviſed out of land; for where a ſtatute, as the ſtatute of wills, give a right, the party by conſequence ſhall have an action at law to recover it (*a*).

(*a*) The queſtion in this caſe related to a very different ſubject (the pleading the ſtatute of limitations to a ſuit in the admiralty for wages). The point here ſtated is mentioned in the reports of the caſe, 6 *Mod.* 26, and 2 Ld. *Raym.* 937., but in both thoſe books it is tacked at the end of the caſe, without ſhewing how the Ch. Juſtice connected it with his argument. In *Holt* 419. it is mentioned (as here) without any reference to the principal caſe. In *Com.* 137., and 3 *Salk.* 227., it is wholly unnoticed.

2. Smell *contra* Dee.

[Mich. 6 Ann. In Canc.]

H. Bequeathed by his will in theſe words, *viz. I give* 100*l. a-piece to the two children of* J. S. *at the end of ten years after my deceaſe*: The children died within the ten years. *Et per Cowper*, Lord Chancellor, This is a lapſed legacy, and ſhall not go to the executors of the children; for the diverſity is where the bequeſt is to take effect at a future time, and where the payment is to be made at a future time. And though it was objected by Sir *Thomas Powys*, that this differed from the caſe where a man deviſed 100*l.* to *J. S.* at his age of twenty-one, becauſe it is a contingency whether he attain to that age; but the expiration of the ten years is inevitable; yet the Lord Chancellor anſwered, that wherever the time is annexed to the legacy itſelf, and not to the payment of it, if the legatee dies before the time of payment, it is a lapſed legacy in that caſe. *Vide Dy.* 59. *b.* 2 *Vent.* 342. *Off. Ex.* 347. *Swinb.* 311, 313. (*a*)

Where a time is annexed to the legacy, and not to the payment, and legatee dies before that time, it is lapſed. Hugh's Abr. 1 pt. 664. c. 14.

2 Vent. 346, 366. 2 Chan. Caſes 155. Skin. 148. See 1 Chan. Caſes 60, 196. 1 Chan. Rep. 183, 188. 2 Chan. Rep. 98. 2 Vern. 508, 673.

If a legacy be deviſed generally, and no time aſcertained for the payment, and the legatee be an infant, he ſhall be paid intereſt from the expiration of the firſt year after the teſtator's death; but it ſeems a year ſhall be allowed, for ſo long the ſtatute of diſtribution allows before the diſtribution be compellable, and ſo long the executor ſhall have, that it may appear whether there be any debts; but if the legatee be of full age, he ſhall only have intereſt from the time of his demand after the year; for no time of payment being ſet, it is not payable, but upon demand, and he ſhall

(*a*) *Vide* 1 *Br. Ch.* 119., and notes in 2d ed. thereof 191, 298. *Forreſter* 117. 2 *Atk.* 185. 1 *Vez.* 44, 208. 1 *Wms.* 566. 3 *Bro. P. C.* 337. 2 *Bro. Ch.* 75. 3 *Bro. Ch.* 298, 473. *Butl.* note to *Co. Lit.* 237. 2 *Ch. Ca.* 155. 1 *Eq. Ca. Ab.* 295. 1 *Vern.* 225. 3 *Atk.* 427. 2 *Wms.* 612.

In 1 *Brown.* 298., 3 *Brown.* 473., this ſubject is very fully inveſtigated, and the ſeveral caſes relative to it are conſidered. The reſult as to perſonal legacies is as ſtated in the authority laſt mentioned. That when the time is mentioned as referring to the legacy itſelf, unleſs it appears to have been fixed by the teſtator as abſolutely neceſſary to have arrived before any part of his bounty can attach to the legatee, the legacy attaches immediately, and the time of payment is merely poſtponed, not being annexed to the ſubſtance of the gift; but if the teſtator intended it as a condition precedent upon which the legacy muſt take place, then, if ſuch condition or contingency does not happen, the gift never arrives. The word *if* is always conſidered as conditional; *at* ſuch a time, is alſo held to be attached to the ſubſtance of the legacy; *when* is merely to denote the time of payment; giving intereſt in the mean time alſo ſhews the legacy to be immediately veſted.

not have intereſt but from the time of his demand; otherwiſe it is in caſe of an infant, becauſe no laches is imputed to him. But where a certain legacy is left payable [416] at a day certain, it muſt be paid with intereſt from that day (*a*). *Et nota*; The intereſt allowed is 5*l. per cent.* (*b*), *per Cowper*, Lord Chancellor.

(*a*) Legacies chargeable upon land yielding preſent profit, (or rents charge, *Stonehouſe* v. *Evelyn*, 3 *Wms.* 252.), mortgages carrying intereſt, or ſtocks yielding profits half-yearly, carry intereſt from the teſtator's death. Thoſe given out of the perſonal eſtate, or charged on a dry reverſion, from the end of a year afterwards, *Maxwell* v. *Wettenhall*, 2 *P. Wms.* 25. In *Knapp* v. *Powell*, *Prec. Ch.* 11. 2 *Eq. Ca. b.* 564., a legatee who had no notice of his legacy or the teſtator's death, till the executor publiſhed it in the Gazette, and then demanded it, was not allowed any intereſt.

In *Joliff* v. *Crow*, *Prec. Ch.* 161. 1 *Eq. Ab.* 286. 2 *Eq. Ab.* 565., it was ruled that a legacy payable on a certain day, ſhould only carry intereſt from the time of its being demanded. But in *Eaſt* v. *Thornbury*, 3 *Wms.* 125., where a legacy was given to *A.* payable at the end of a year from the teſtator's death, and *A.* after that period intermarried with *B.*, who received intereſt from the marriage for ſome years, and then received the legacy and gave a receipt; *A.* and *B.* were allowed to recover the intereſt which had accrued from the end of the year until the intermarriage. Where a legacy was to be paid within five years, intereſt was decreed from the end of the five years, *Lloyd* v. *Williams*, 2 *Atk.* 110. *Vide Bilſon* v. *Saunders*, *Bunb.* 240. See *Ca. Ch.* 72.

If a parent gives legacies to his children, payable at twenty-one, or any other given period, without making an expreſs proviſion for their maintenance, they are entitled to intereſt in the mean time; but it is otherwiſe with reſpect to legacies by ſtrangers. *Attorney-General* v. *Thompſon*, *Prec. Ch.* 337. 1 *Eq. Ab.* 301. *Harvey* v. *Harvey*, 2 *P. Wms.* 21. *Green* v. *Belcher*, 1 *Atk.* 505. *Incledon* v. *Northcote*, 3 *Atk.* 430, 438. *Heath* v. *Perry*, 3 *Atk.* 102. Such a legacy by a grandfather does not carry intereſt, *Palmer* v. *Maſon*, 1 *Atk* 505. *Butler* v. *Freeman*, 3 *Atk.* 58.; nor does a legacy from a father, if other maintenance is expreſsly provided, *Hearle* v. *Greenbank*, 1 *Vez.* 299, 307.

If certain property in the funds is ſpecifically bequeathed, the legatee is entitled to the produce from the teſtator's death; but it is otherwiſe if a quantity of ſtock is given generally, *Sleech* v. *Thorington*, 2 *Vez.* 560.

With reſpect to intereſt, when a legacy is given *in præſenti* to an infant, and limited over upon his dying under age, *vide Lillcott* v. *Compton*, 2 *Vern.* 638. *Tiſſon* v. *Tiſſon*, 1 *Wms.* 500. *Green* v. *Eakins*, 2 *Atk.* 473. *Chaworth* v. *Hooper*, 1 *Bro. Ch.* 82. *Hawkins* v. *Coombe*, 1 *Bro. Ch.* 335. *Shephard* v. *Ingrain*, *Ambler* 448. *Taylor* v. *Johnſon*, 2 *Wms.* 504.

With reſpect to points on the conſtruction of wills relative to this ſubject, *vide Acherly* v. *Wheeler*, 1 *Wms.* 783. *Heath* v. *Perry*, 3 *Atk.* 101. *Beckford* v. *Tobin*, 1 *Vez.* 308.

(*b*) *Bryant* v. *Speke*, 1 *Vez.* 171., *Per* Ld. Chancellor, The general rate is, that legacies out of real eſtate carry one *per cent.* lower than the legal intereſt; but if out of perſonal eſtate, becauſe of the higher intereſt of money than land, it ſhall carry the legal intereſt, unleſs particular circumſtances induce the Court to vary therefrom; but for that a ſpecial caſe muſt be made. *Vide Beckford* v. *Tobin*, 1 *Vez.* 308. *Moore* v. *Moore*, 3 *Atk.* 402. Ld. *Trimleſtown* v. *Colt*, 1 *Vez.* 277.

3. Hern *contra* Merick.

[*Coram* Harcourt, Lord Chancellor. In Canc. S. C. 1 P. Wms. 201. Gilb. Chan. 307. 1 Eq. Ca. Ab. 143. pl. 11.]

Where real eſtate ſhall be charged with legacies in equity. Vide ante 415. 1 Chan. Rep. 134, 288. 2 Chan. Rep. 200. 1 Chan. Caſes 57, 257, 258. 1 Wilſon 24. 2 Atk. 624. 1 Vent. 31. 2 Vern. 727.

HSeiſed in fee, and indebted by bonds, by will gives legacies to children, (whom he had otherwiſe provided for before,) and deviſes his land to his eldeſt ſon in tail. The eldeſt ſon, being alſo executor, pays the bonds with the perſonal eſtate; and now the legatees brought a bill to come againſt the real eſtate in the place of the bond creditors, and be paid out of the land. The Court ſeemed to admit, that if the lands had deſcended, the legatees might have been relieved in this manner; but ſince the teſtator had deviſed them, it was reſolved, that they ought to be exempted; for it was as much the teſtator's intention that the deviſee ſhould have this land as the other ſhould have the legacies, and a ſpecific legacy is never broke into, in order to make good a pecuniary one. Alſo this caſe is out of the ſtatute againſt fraudulent deviſes, becauſe the debts are paid, and the children being otherwiſe provided for, are not in the nature of creditors. *Nota*; This caſe was upon an appeal from the decree of the Maſter of the Rolls, who held, that the real and perſonal eſtate ſhould be ſo charged, that both the debts and legacies ſhould be paid (*a*).

Skin. 158.

(*a*) In *Cliſton* and *Burt*, 1 *P. Wms.* 679., it was ruled, that an eſtate deviſed in fee ſhould not be charged with a legacy where the perſonal eſtate was exhauſted by a ſpecialty debt. The whole law upon this ſubject is thus collected in a note to that caſe by Mr. *Cox*.

"It being the object of a court of equity, that every claimant upon the aſſets of a deceaſed perſon, ſhall be ſatisfied as far as ſuch aſſets *can* by any arrangement *conſiſtent* with the nature of the reſpective claims, be applied in ſatisfaction thereof; it has been long ſettled, that where one claimant has more than one fund to reſort to, and another claimant only one, the firſt claimant ſhall reſort to that fund on which the ſecond has no lien. *Lancy* v. Duke of *Athol*, 2 *Atk.* 444. *Lacam* v. *Mertins*, 1 *Ves.* 312. *Mogg* v. *Hodges*, 2 *Ves.* 53. If therefore a ſpecialty creditor, whoſe debt is a lien on the real aſſets, receive ſatisfaction out of the perſonal aſſets, a ſimple contract creditor ſhall ſtand in the place of the ſpecialty creditor, againſt the real aſſets, *ſo far* as the latter ſhall have exhauſted the perſonal aſſets in payment of his debt. *Anon.* 2 *Chan. Ca.* 4. *Sagitary* v. *Hyde*, 1 *Vern.* 455. *Neave* v. *Alderton*, 1 *Eq. Ca. Ab.* 144. *Wilſon* v. *Fielding*, 2 *Vern.* 763. *Galton* v. *Hancock*, 2 *Atk.* 436. And legatees ſhall have the ſame equity as againſt aſſets deſcended, *Culpepper* v. *Aſton*, 2 *Chan. Ca.* 117. *Bowaman* v. *Reeve*, *Pre. Cha*, 578. *Tipping* v. *Tipping*, 1 *P. Wms.* 730. *Lucy* v. *Gardiner*, *Bunb.* 137. *Lutkins* v. *Leigh*, *Ca. Temp. Talb.* 54. So where lands are ſubjected to the payment of *all* debts, a legatee ſhall ſtand in the place of a ſimple contract creditor, who has been ſatisfied out of perſonal aſſets, *Hazlewood* v. *Pope*, 3 *P. Wms.* 323. So where legacies by will are charged

on the real eſtate, but not the legacies by codicil, the former ſhall reſort to the real aſſets upon a deficiency of the perſonal aſſets to pay the whole, *Hyde* v. *Hyde*, 3 *Chan. Rep.* 83. *Maſters* v. *Maſters*, 1 *P. Wms.* 422. *Bligh* v. Earl of *Darnley*, 2 *P. Wms.* 620. But from the principles of theſe rules it is clear, that they cannot be applied in aid of one claimant ſo as to defeat the claim of another; and therefore a pecuniary legatee ſhall not ſtand in the place of a *ſpecialty creditor* as againſt land deviſed, though he ſhall as againſt land deſcended. *Clifton* v. *Clifton*. *Hazlewood* v. *Pope*. *Scott* v. *Scott*, *Ambler* 383. But ſuch legatee ſhall ſtand in the place of a mortgagee, who has exhauſted the perſonal aſſets to be ſatisfied out of the mortgaged premiſes, though ſpecifically deviſed, *Lutkins* v. *Leigh*, *Ca. Temp. Talb.* 53. *Forreſter* v. Ld. *Leigh*, *Amb.* 171. For the application of the perſonal aſſets, in caſe of the real eſtate mortgaged, does not take place to the defeating of any legacy. *Oneal* v. *Mead*, 1 *P. Wms.* 693. *Tipping* v. *Tipping*, 1 *P. Wms.* 730. *Davies* v. *Gardiner*, 2 *P. Wms.* 190. *Rider* v. *Wager*, 2 *P. Wms.* 335. And it is to be obſerved, that none of the rules abovementioned ſubject any fund to a claim to which it was not before ſubject, but only take care that the election of one claimant ſhall not prejudice the claims of the others, 2 *Atk.* 438. 1 *Ves.* 312. So in *Robinſon* v. *Tonge*, *ac.* 15 *Oct.* 1739. *A.* ſeiſed of freehold and copyhold lands, mortgaged the ſame, and died indebted by mortgage, and on ſeveral bonds. The ſpecialty creditors inſiſted that the Court, in marſhalling the aſſets, ſhould caſt the whole mortgage upon the copyhold eſtate, in order that the ſpecialty creditors might have the benefit of the whole freehold eſtate. But the Court ſaid that copyhold eſtates were not liable, either in law or equity, to the teſtator's debts, further than he ſubjected them thereto; and ordered, that the copyhold eſtate ſhould bear its proportion with the freehold eſtate, for payment of the mortgage; and ſhould not be liable to make ſatisfaction for the ſpecialty debts. *Reg. Lib. B.* 1738. fol. 483. It is now ſettled, that the Court will not marſhal aſſets in favour of a charitable bequeſt, ſo as to give it effect out of the perſonal chattels, it being void ſo far as it touches any intereſt in land. *Mogg* v. *Hodges*, 2 *Ves.* 52. *Attorney-General* v. *Tindal*, *Amb.* 614. *Foſter* v. *Blagden*, *Amb.* 704. *Hillyard* v. *Taylor*, *Ambler* 713.

Where a legacy is payable out of a mixed fund of real and perſonal eſtate, payable at a future day, and the legatee dies before the day of payment, *quære*, Whether the Court will marſhal aſſets ſo as to turn ſuch legacy upon the perſonal eſtate? in which caſe it would be veſted and tranſmiſſable; whereas, as againſt the real eſtate, it would ſink by the death of the legatee. *Vide Prowſe* v. *Abingdon*, 1 *Atk.* 482. *Peatſe* v. *Taylor*, *Trin. Vac.* 1790, before Ld. *Thurlow*. As to the right of a wife to have aſſets marſhalled in reſpect of her paraphernalia, *vide Tipping* v. *Tipping*, 1 *P. Wms.* 729. *Tynt* v. *Tynt*, 2 *P. Wms* 542.

Libellus Famoſus.

See 4 Co. 14, 15. 5 Co. 125, &c. 9 Co 53, 59. 3 Inſt. 174. Mo. 813, 627. 1 Sid. 142. 2 Show. 468, 471, 488. Poſt. 646. S. C. Ante 324. 3 Salk. 226. Caſes B. R. 218. Holt 422. Carth. 407.

Dominus Rex *verſus* Bear.

[Hill. 10 W. 3. B. R. 1 Ld. Raym. 414. S. C.]

INDICTMENT for compoſing, writing, making, and collecting ſeveral libels, *in uno quorum continetur inter alia juxta tenorem & ad effectum ſequent'*, and then ſets out the words. Upon not guilty pleaded, the jury found the defendant guilty as to the writing and the collecting *prout in indictamento ſupponit' & quoad omnia alia præter ſcriptionem & collectionem* not guilty. An exception was taken in arreſt of judgment, that *inter alia* ſhewed there was ſomething elſe which perhaps might, if it appeared, qualify the reſt.

The whole libel need not be ſet forth in indictment, but if any part qualifies the reſt, it may be given in evidence. See 5 Mod. 163, 164, &c. 1 Sid. 270, 271.

Et per Cur. Non allocatur; for if that had been the caſe, the defendant could not have been found guilty; and regularly, where a man ſpeaks treaſon, *God ſave the king* will not excuſe him. *Vide* 2 *Ro. Rep.* 89. And it is not neceſſary to ſet forth all the libels; but if any thing qualify that which is ſet forth, it muſt be given in evidence.

5 Co. 125. 1 Mod, 58. Hard. 470. Fareſly 91. 1 Danv. 156. 1 Vent. 25. 2 Sid. 163. 4 Co. 14. b.

2dly, It was agreed, *ad effectum ſequentem* of itſelf had been naught; for the Court muſt be judge of the words themſelves, and not of the conſtruction the proſecutor puts upon them; but *juxta tenorem ſequent'* imports the very words themſelves. *Vide Co. Entr.* 116. *Reg.* 169. For the *tenor* of a thing is the tranſcript: And *Rokeſby* ſaid, the words *ad effectum* were looſe and uſeleſs words; and the words, *juxta tenorem*, being of a certain and more ſtrict ſignification, the force of the latter was not hurt by the former, for *utile per inutile non vitiatur; quod Holt*, C. J. *conceſſit;* and the caſe of *Saltaſhe*, *H.* 33 & 34 *Car.* 2. *B. R. Rot.* 1154. was remembered and agreed; and all were of opinion, that the words *ad effectum* were corrected by the words *juxta tenorem.*

Hard. 223. Yelv. 117. 1 Lev. 240. 1 Bulſt. 151. 2 Brownl. 100. 1 Saund. 131. 2 Saund. 367. 3 T. R. 429. n. Mod. Caſes 102, 103. Poſt. 660. Doug. 184.

3dly, It was held, that the finding guilty of bare writing and collecting was criminal, not but that collecting had been better out of the caſe; for, *per Holt*, C. J., bare copying out of a libel, by one that is neither contriver nor compoſer, is highly criminal; and as to this the Chief Juſtice ſaid, the eſſence of a libel conſiſts not in the infamous matter, for if a man ſpeaks ſuch words, unleſs the words

Copying a libel is criminal. 5 Mod. 165.

Eſſence of a libel conſiſts in the writing.

words be put in writing, he is not guilty of a libel; but the nature of a libel conſiſts in putting this infamous matter into writing; and therefore if *Bear* writ ſuch matter, he is a libeller; for it was not a libel till it was written; and in all caſes where a man does that act, which makes a thing to be what it is, he is and muſt be conſtrued to be the doer of that thing. This is ſeen in all offences, from the higheſt to the loweſt.

11 Rep. 36. Bur. 2686. 2 Mod. 167. Gilb. Law of Evidence, by Lefft. 635.

If *H.* contrives any treaſonable matter, and another writes down the contrivance, the writer is as guilty as the inventor. Where an act of parliament makes *ſodomy* felony, and ſays nothing of the abettors, if *B.* ſhould ſtand by and hold the door while *A.* committed *ſodomy*, *B.* would be as guilty of felony as *A.* So in 3 *Inſt.* 59., where an act of parliament makes any thing felony, though nothing be ſaid of the acceſſaries in the ſtatute. So in the loweſt offences, where there are no acceſſaries, but all are principals, as if *H.* ſhould hold *A.* while *B.* beats him, he is guilty of the battery.

So in the principal caſe, he that does that without which the thing could not be what it is, *viz.* a libel, cannot be conſtrued to be innocent.

He that writes a libel is the contriver. 3 Mod 68. 1 Hawk. c. 73. § 10.

It is objected, that it is held in 9 *Co.* 59. *Lamb's* caſe, that a libeller muſt be either the *contriver*, *procurer*, or the *publiſher*. But this ought to be expounded by *Moor* 813. where the writer is held to be in law a *contriver*; and then that ground of my Lord *Coke's* may be admitted to be law; otherwiſe it will be doubtful; for if that caſe be looked into, the queſtion there was about the publication of a libel; and it was held, that writing the copy of a libel was not a publication, but only evidence of a publication; but there was no queſtion made how far he was guilty of libelling; and for the matter of publication, the bare having a libel is not a publication. If a libel be publicly known, having a written copy of it, is an evidence of a publication; but otherwiſe where it is not known to be publiſhed.

Having a written copy of a known libel, is evidence of a publication. See 5 Mod. 165.

3 Mod. 68.

It is objected, that writing a libel may be a lawful act, as by the clerk that draws the indictment, or by a ſtudent who takes notes of it; and ſo the defendant's might be a lawful writing.

Where a matter is unlawful in general, a general allegation ſhall be ſo taken.

To this the Chief Juſtice anſwered, that the matter abſtractedly conſidered is unlawful, therefore the general finding ſhall be taken to be criminal; and that if the writing was innocent, as in the caſe objected, there ought to be a ſpecial finding of theſe particulars, which diſtinguiſh and excuſe it. If an action be brought on the ſtatute of maintenance, it is ſufficient to ſay, *quod manutenuit*; yet in ſome circumſtances a man may lawfully maintain a ſuit, as an attorney or a near relation; yet becauſe it is unlawful

Bur. 2667, 2687. 2 Ld. Rep. 1238.

in

in abſtracto, that general allegation is enough, and ſhall be underſtood of an unlawful maintenance; and farther, it cannot be underſtood of ſuch a writing; for if an * officer or ſtudent does it, it is no libel becauſe it is not done *ad infamiam* of the party, but to bring the offender to puniſhment, and it is only *tenor libelli*, and upon ſuch evidence the defendant could not be found guilty. The caſe in 3 *Inſt.* 174. is a ſtrong caſe: In that caſe *J. de Northampton* is charged with writing only, and there is no mention made of a publication.

I am not under any neceſſity of giving my opinion, whether writing a copy of a libel be writing of a libel? for if it be not, then jury having found the defendant guilty of writing a libel, he muſt be taken to be guilty of writing the original, and a copy could not be given in evidence. On the other ſide, if the copy of a libel be a libel, then the writing of it is a great offence: But that people may not go away with a notion, that writing of a copy, though by one that has no warrantable authority, is not libelling, the Chief Juſtice ſaid, that ſuch a copy contained all things neceſſary to the conſtitution of a libel, *viz.* the ſcandalous matter, and the writing; and it has the ſame pernicious conſequence; for it perpetuates the memory of the thing, and ſome time or other comes to be publiſhed; therefore he held, that writing a copy of a libel was writing a libel; and if the law were otherwiſe, men might write copies and print them with impunity.

Writing a copy of a libel without authority, is writing a libel. 5 Mod. 164, 165. Pop. 139. 12 Rep. Dr. Wooton's Caſe. 3 Inſt. 134. 1 Vent. 31.

Further, the Chief Juſtice ſaid, that the defendant had great favour in the verdict, for when a libel appears under a man's own hand-writing, and no other author is known, he is taken in the manner, and it turns the proof upon him; and if he cannot produce the compoſer, it is hard to find that he is not the very man. A man could have no temptation to write ſuch libels, but rancour againſt the government.

Laſtly, It was objected, that the defendant being found guilty of collecting and writing, and not of making and compoſing, the verdict is repugnant, or an acquittal; *ſed non allocatur*; for making is the genus, and compoſing and contriving is one ſpecies; writing, a ſecond ſpecies; and procuring to be written, a third ſpecies; ſo that not finding him guilty of all, but writing only, is finding him not guilty of any ſpecies of making, but writing. *Juſtin. Inſt. lib.* 4. *cap.* 4. *par.* 1. *de injuriis*, and *Bract. lib.* 3. *Fitz. tit. Coron.* 135. Bare writing was puniſhable in the Star-chamber. *Hob.* 62, 215. 12 *Co.* 35. *Helt* 4. *Moor* 421. *Dy.* 372.—Judgment *pro rege*.

Cro. Car. 125.

Limitations.

Far. 49. See 1 Saund. 37. 2 Saund. 66, 120, 125. 1 Sid. 305. Hutt. 109. Cro. Car. 163, 513, 535. 5 Mod. 426. 2 Mod. 71, &c. Vid. 1 Lev. 149, 143. S. C. Carth. 136. 1 Show. 98.

1. Hall *verſus* Wybourn.

[Trin. 1 W. & M. Rot. 130. B. R.]

Defendant's being beyond ſea does not avoid the ſtatute of limitations. Comber. 190. 2 Mod. 311. Note; the law is now altered by ſtat. 4 & 5 Ann. c. 16. 1 Sid. 465. 2 Vent. 256. 3 Lev. 21, 283, 367. 6 Mod. 240. Show. 99. Jon. 253.

IN bar of the ſtatute of limitations, the plaintiff replied, that the defendant was beyond ſea, and it was held no plea, for the plaintiff might either file his original, or outlaw him; and in one *Bynton*'s caſe, it was held by *Bridgman*, C. J. that though the courts of juſtice were ſhut up ſo as no original could be filed, yet this ſtatute would bar the action; becauſe the ſtatute is general, and muſt work upon all caſes which are not exempted by the exception.

2. Budd *verſus* Berkenhead.

[Trin. 2 W. & M. B. R.]

In replication to avoid the ſtatute of limitations, the continuances muſt be ſhewn. See 2 Show. 79. 3 Mod. 111, 212. 1 Lord Raym. 435. 2 Str. 739. 2 Atk. 395. 1 Wiſ. 167.

DEFENDANT having pleaded the ſtatute of limitations, the plaintiff replied in avoidance, that he ſued out an attachment returnable *Mich.* 34 *Car.* 2. *Et quod ſuperinde taliter proceſſum fuit*, that the defendant in *Michaelmas* term, 2 *Jac.* 2., appeared, *&c. Et per Cur.* This pleading is not good; it muſt be ſhewn that there were continuances till the time of declaring, and a *taliter proceſſum* is not ſufficient to ſhew a matter before declaration, though it has been held ſo for matters after.

Bull. N. P. 151. 3 T. R. 662. 1 Eſpinaſſe 157.

3. Coventry *verſus* Apſley.

[Mich. 3 W. & M. Rot. 411. B. R.]

Impriſonment, ſtatute of limitations pleaded to part. Plaintiff ought to reply, it was one continued dureſs. Vide poſt. pl. 11. Comb. 25.

TRESPASS for impriſoning him, and detaining him in priſon from 32 *Car.* 2., till the 3d of *April*, 4 *Jac.* 2. The defendant pleaded as to all, till 34 *Car.* 2., ſuch a day, *non cul. infra quatuor annos*; and as to the reſt, a plaint and a *capias* iſſued. The plaintiff demurred. *Et per Cur.* Though the impriſonment be complained of as one continued impriſonment, yet the defendant may divide

vide

vide the time, and plead the ſtatute as to part, and the plaintiff may reply the continuance; therefore as to this, judgment was given againſt the plaintiff upon his demurrer, but for him as to the reſt; becauſe the *capias* was awarded by the Court *ex officio*, and it did not appear that the defendant meddled in it.

Salk. 638. Bull. N. P. 24. 2 H. Black. 16.

*[421]

* 4. Cary & Ux. *verſus* Stephenſon.

[Paſ. 6 W. & M. B. R. Intr. Hill. 5 W. & M. Rot. 37.]

Comber. 311. S. C. called Curry & Ux. ver. Stephens. Skin. 555. 5 Mo. a 204

H. Was indebted to *A.* who died, *B.* received the money, and afterwards the plaintiff's wife took out letters of adminiſtration to *A.*, and within ſix years after the letters of adminiſtration, but not within ſix years after the receipt of the money, brought an *indebitatus aſſumpſit* againſt *B.* as for money had and received to the uſe of him and his wife; the defendant pleaded *non aſſumpſit infra ſex annos*; the plaintiff replied the ſpecial matter; and, upon demurrer, the Court were of opinion, that the ſtatute could be no bar, becauſe the plaintiff's title commenced by taking out letters of adminiſtration, and this was not a cauſe of action in the inteſtate; but they thought it hard to make this ſo much money received to the plaintiff's uſe, when at the time of this receipt, he was not adminiſtrator. *Note*; There was a faulty replication, and the Court adviſed the plaintiff to bring a new action, and ſo the matter went off.

A. received the inteſtate's money, and afterwards adminiſtration was granted to B. The cauſe of action accrues by the adminiſtration. See 1 Chan. Caſes 152. 2 Chan. Caſes 217. & poſt. pl. 9. 4 Mod. 376. Carth. 335. S. C. 2 Saund. 150. called Curry ver. Stephenſon. 2 Cro. 60, 61. Holt 58. Goulſ. 171. Vide 2 Str. 507. Fitzg. 81.

5. Stokes *verſus* Berry.

[*At the Summer Aſſizes at* Lincoln, 1699. *Coram* Holt, *C. J.* 1 Ld. Raym. 741. S. C. named Stocker *verſus* Berney.]

IF *A.* has had poſſeſſion of lands for twenty years without interruption, and then *B.* gets poſſeſſion, upon which *A.* is put to his ejectment, though *A.* is plaintiff, yet the poſſeſſion of twenty years ſhall be a good title in him, as if he had ſtill been in poſſeſſion. Ruled *per Holt*, C. J. The ſame point was ruled by *Holt*, C. J. at Lent aſſizes for *Bucks*, 12 W. 3., becauſe a poſſeſſion for twenty years is like a deſcent, which tolls entry, and gives a right of poſſeſſion, which is ſufficient to maintain an ejectment.

Twenty years poſſeſſion is a good title in ejectment for the plaintiff, as well as defendant. Holt 264. S. C. 1 Mod. Cas. 287. Poſt. 685.

S. C. Far. 12. vide ibid. 5.

6. Green *verſus* Rivett.

[Paſ. 1 Ann. B. R. Intr. Mich. 13 W. Rot. 316. Ld. Raym. 772. S. C.]

*[422]

Plea of the ſtatute of limitations to be favoured. Vide 1 Mod. 31, 89, 268. 2 Mod. 71, 311. 1 Vent. 90. 2 Saund. 125, 127. 1 Saund. 36, 37, 120, 127. 2 Saund. 120, 121, 125, 262. 2 Mod. 72. Comberb. 70. 1 Show. 354. 2 Show. 79, 126. 3 Salk. 227. Vide 2 Bl. Rep. 1131. 1 Bl. R. 286, 215. 2 Bur. 958.

INDEBITATUS aſſumpſit laid ſeveral ways; the defendant pleaded *actio non, quia dicit quod billa prædict. exhibit fuit* 20 *die Junii & non antea, & quod ipſe ad aliquod tempus infra ſex annos ante exhibitionem billæ prædict. Non aſſumpſit, &c.* The plaintiff replied a bill of *Middleſex*, teſted *die Lunæ prox' poſt tres ſeptimanas, &c.* returnable the ſame day, whereupon was returned *non eſt inventus*, and continued down by *vic. non miſit breve & præcept. ſicut alias*; to this it was * demurred, and judgment given for the defendant; for there cannot be ſuch a bill of *Middleſex* as this, which is returnable the very day of the *teſte* (*a*); and the ſtatute of limitations, on which the ſecurity of all men depends, is to be favoured.

(*a*) By the *report* in Ld. *Raym.* it ſeems that a bill of *Middleſex* cannot be returned the ſame day that it is ſued out; but the contrary is ruled, 4 *T. R.* 611.

7. Hunt *verſus* Burn.

S. C. 1 Salk. 339.

[Hill. 1 Ann. B. R. Vide *the State of this Caſe, tit.* Fines, pl. 5. vol. 1. p. 339.]

H. barred of his formedon, may take advantage of a right of entry. 1 Lutw. 779. 1 Salk. 341. Lutw. 813.

UPON the queſtion in this caſe, whether it appeared by the verdict, that the iſſue in tail was barred of his *formedon* by 21 *Jac.* 1. the Court held, that the verdict was inſufficient; and that it ſhould have found that no *formedon* was brought, elſe the Court could not intend but that it was brought; for this is matter of bar, which ſhould come on the defendant's part to ſhew; and this act is not penned as the ſtatute *de finibus*: It is enough in that caſe to find a fine, and you need not find that the party claimed or entered not, for that comes in by way of proviſo; but here it is part of the body of the act.

2dly, They held, that ſuppoſing him barred of his *formedon*, yet he is not thereby hindered to purſue his right of entry, which accrued to him by the death of tenant for life; for this is a new right which he had not before: That where a man releaſes his right, he cannot purſue his action or remedy; but if a man has a right and ſeveral remedies, the diſcharge of one is not a diſcharge of the other, and that the ſtatute of 4 *H.* 7. enures and operates by

by way of bar to the right, which anſwers *Saul* and *Clerk*'s caſe, *Jones* 210, 211. But the 21 *H.* 8. and the 21 *Jac.* 1. operate by way of bar to the remedy, and the word *right* there is right of entry (*a*).

(*a*) This caſe was affirmed in *Dom. Proc.* 1 *Brown P. C.* 53.

8. Heyling *verſus* Hoſkins.

Vide *this Caſe, title* Action ſur le Caſe ſur Aſſumpſit, pl. 19. vol. 1. p. 29.

9. Gould *verſus* Johnſon.

[Hill. 1 Ann. B. R. 2 Ld. Raym. 838. S. C. Pleadings and Record, 3 Ld. Raym. p. 7.]

ASSUMPSIT, That in conſideration that the plaintiff, at the defendant's requeſt, would receive *A.* and *B.* into his houſe *ut hoſpites*, and diet them, the defendant promiſed, &c. *Non aſſumpſit infra ſex annos* was pleaded; the plaintiff demurred; and held no plea; for the defendant cannot in ſuch caſe plead *non aſſumpſit infra ſex annos*, but *actio non accrevit infra ſex annos*; for it is not material when the promiſe was made, if the cauſe of action be within the ſix years; and the dieting might be long afterwards; and though it appears upon the face of the declaration, that the cauſe of action did not ariſe within ſix * years; yet the defendant ſhall not take advantage of that, without pleading; becauſe there might be an original ſued out, which the plaintiff cannot otherwiſe ſhew than by way of replication, upon the defendant's putting him upon it.

Where the duty ariſes on conſideration executory, the defendant muſt plead quod actio non accrevit, &c. Vide ante, pl. 4. 2 Show. 79, 126. 1 Mod. 71, 268. 2 Saund. 66, 125. 1 Saund. 36, 37. 1 Vent. 89. 2 Keb. 674. 1 Lev. 298. S. C. Ante 25. Far. 143. Holt 34. See 1 Mod. 71, 89, 268, 269. 2 Mod. 311. 1 Lev. 48, 111. 2 Saund. 127.

1 Lev. 287, 298. 2 Mod. 312. 1 Vent. 89. 1 Sid. 465. Bur. 1281. 3 Atk. 71.

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10. Reading *verſus* Royſton.

See Fareſt. 5 & 12.

[Hill. 1 Ann. B. R. 2 Ld. Raym. 829. S. C.]

ONE ſeiſed in fee, having iſſue two daughters, deviſed his land to his grandſon by his eldeſt daughter, in fee; the eldeſt daughter being dead at the time of the deviſe: The grandſon died without iſſue, and the heir of the grandſon being the heir on the part of the father, and the heir of the other coparcener, entered into the land, and took the profit by moieties for twenty years together, thinking, according to the opinion of Sir *Matthew Hale* in his younger years, (who was their counſel,) that the deviſe was void

Statute of limitations runs not againſt heirs, unleſs actually ouſted or diſſeiſed. S. C. Ante 242. Pre. Ch. 222. Vi. 5 Bur. 2064. Cowp. 217.

Co. Lit. 163. b. 1 Co. 93, 94. b. 1 And. 69. Owen 65.

for one moiety. Now the miſtake being diſcovered, the heir of the grandſon brought an ejectment againſt the heir of the other coparcener; and upon a ſpecial verdict found, it was objected in his behalf, that the deviſe was void as to one moiety; but this being over-ruled, (*quod vide* title *Diſcent, pl.* 3. *vol.* 1. *p.* 242.) it was then objected, that the bringing of this ejectment againſt the heir of the other coparcener, for this moiety, admitted the plaintiff to be out of poſſeſſion for twenty years, and then he was barred by the ſtatute of limitations. *Sed per Cur.*,

Ante 392. Co. Lit. 199, 243. 3 Bl. Com. 170. Com. Dig. Seiſin, F.

The ſtatute of limitations never runs againſt a man, but where he is actually ouſted or diſſeiſed; and true it is, one tenant in common may diſſeiſe another; but then it muſt be done by actual diſſeiſin, and not by bare perception of profits only (*a*); but here the difficulty is not ſo great; there is no tenancy in common in this caſe, for the heir of the grandſon had the whole by deviſe, and the other is a mere ſtranger; and where two men are in poſſeſſion, the law will adjudge it in him that hath the right. A man may be tenant in common by preſcription, yet he may not be tenant in common by wrong; nor can a man be diſſeiſed of an undivided moiety; therefore the bringing the ejectment admits nothing; for if a man be ſeiſed of the whole, and makes a leaſe to another of a moiety undivided, and a ſtranger ouſts the leſſee, he muſt bring his ejectment of a moiety; and ſo if they be both ouſted, they muſt bring ſeveral ejectments.

Tenants in common may be by preſcription, not by wrong. 2 Saund. 116. 1 Inſt. 195, 196, 197, 198. 2 Lev. 27. Cannot join in ejectment. 1 Lev. 109. 5 Mod 25, 26, 27. Show. 342.

(*a*) *Per* Ld. *Mansfield*, in *Fiſher* v. *Preſſer, Cowp.* 218., The poſſeſſion of one tenant in common, *eo nomine*, as tenant in common, can never bar his companion; becauſe ſuch poſſeſſion is not adverſe to the right of his companion, but in ſupport of their common title; and by paying him his ſhare, he acknowledges him co-tenant; nor indeed is refuſal to pay of itſelf ſufficient, without denying his title. But if, upon demand by the co-tenant of his moiety, the other refuſes to pay, and denies his title, ſaying, he claims the whole, and will not pay, and continues in poſſeſſion, ſuch poſſeſſion is adverſe, and ouſter enough. And in the ſame caſe it was held, that a jury might preſume actual ouſter from an undiſturbed and quiet poſſeſſion for a great length of time, *ſ.* 36 years. *Vide Eſpinaſſe* 456. 1 *Atk.* 493. 1 *Bl. Rep.* 677. 2 *Bl. Rep.* 690. 1 *Salk.* 391.

S. C. 6 Mod. 240. Rep. A. Q. (11 Mod.) 38.

* [424]

11. Blackmore *verſus* Tidderly.

[Hill. 3 Ann. B. R. 2 Ld. Raym. 1099. S. C.]

Not guilty within ſix years, is ill in treſpaſs. Vide ante, pl. 3. 6 Mod. 5, 12, 59. Fineſ. 99.

IN *treſpaſs* for aſſault and battery, the defendant pleaded *non culp. infra ſex annos*, by miſtake, and not according to * the ſtatute, which is but four years. The plaintiff demurred, and after argument it was adjudged an ill plea; for if it be conſidered as at common law, there was

no ſuch plea; if on the ſtatute, the act is not purſued, and the plaintiff could not take iſſue on it, *quod eſt culp. infra ſex annos* is an iſſue immaterial; becauſe it may be, the jury might find him not guilty *infra quatuor annos*, but guilty *infra ſex annos*. Judgment for the plaintiff.

Vide ſta. 4 Ann. c. 16. ſ. 12.

12. Hide *verſus* Partridge.

[Mich. 4 Ann. B. R. 2 Ld. Raym. 1204. S. C.]

LIBEL was for mariners' wages in the Admiralty Court, and the defendant there pleaded the ſtatute of limitations, *viz.* that no cauſe of action accrued within ſix years *prox' ante tempus mentionat. in libello;* and it was over-ruled there. And now upon a motion for a prohibition it was urged, that mariners' wages were ſuable in the Admiralty by indulgence only, and not of right; that at common law, the ſtatute would be a good plea: On the other ſide it was ſaid, the ſtatute extended only to courts at common law; that it was not pleadable to a proceeding in the Spiritual Court *pro violenta manuum injectione ſuper clericum:* But a prohibition was denied, becauſe the ſtatute was ill pleaded; but the plea was afterwards amended: And *Holt*, C. J. ſaid, It was ſtrange that the ſame matter, well pleaded, ſhould be a defence in one court, and not in another. The ſtatute of limitations is a good plea in Chancery; it is true, it is no plea to a ſuit *pro violenta manuum, &c.* but that is, becauſe the proceeding is *pro reformatione morum*, and not for damages; and ſo it is at common law, it is no plea to an indictment for treſpaſs, otherwiſe in an action. *Adjournat.* (*a*)

Statute of limitations pleadable to a ſuit in the Admiralty for mariners' wages. Quære. Suits for mariners wages. 1 Salk. 31 to 35. 6 Mod. 11, 12, 25, 79. Poſt. 548. Mod. Caſes 424. S. C. 3 Salk. 227. Holt 428. Rep. A. Q. 43. 1 Chan. Caſes 152. 2 Chan. Caſes 217. 2 Saund. 124, 126. 3 Mod. 244. 1 Lev. 298. 4 Mod. 105. 1 Sid. 465. 1 Vent. 146, 343. Raym. 3. Winch. 8. 6 Mod. 238.

(*a*) By ſtat. 4 and 5 *Ann.* ch. 16. theſe ſuits muſt be commenced within ſix years after the cauſe of action.

13. Matthews *verſus* Phillips.

[*Cite and agree* Mich. 6 Ann. B. R.]

DEBT was brought in the Palace Court, and after ſome proceedings there, the ſix years expired; the defendant ſued a *habeas corpus*, and removed the cauſe into *B. R.*, where the plaintiff declared *de novo*, and the defendant pleaded, that the cauſe of action did not accrue within ſix years before the *teſte* of the *habeas corpus;* and this was held to be a good plea, but that the plaintiff might reply the ſuit below, and ſhew that to have been within the ſix years; not that this ſuit was a continuance of the ſuit below, but that the plaintiff had rightfully and legally purſued his right; and it ſhould not be in the power

Action removed by habeas corpus, ſtatute of limitations pleaded above, plaintiff may reply, the ſuit below was within ſix years. See 2 Show. 79, 126. 1 Sid. 228. 1 Lev. 147. See 5 Mod. 426. 1 Mod. 89. 2 Lev. 166. Lutw. 258, 263,

265. 2 Lord Raym. 1429. S. P. 2 Str. 719. Buil. N. P. 151. Fitzg. 170, 289.

of the defendant to defeat or hinder him of a remedy, without any default; as where one brings an action before the expiration of ſix years, and dies before judgment, the ſix years being then expired, this ſhall not prevent his executor *.

* *Nota.* In debt upon an award, the ſtatute of limitations is no plea, 2 Saund. 65, 67. Nor in a writ de rationabili parte bonorum. Hutt. 109. Nor in an action on the caſe for conſpiring to indict, &c. Cro. Car. 163. Nor in debt for an eſcape. 1 Saund. 37. 1 Sid. 305. Quære, Nor in caſe for money levied on a fieri facias by the ſheriff, 1 Mod. 245. Nor to an action for a falſe return of reſcous. Smith verſus Robinſon, in C. B. Trin. 8 W. 3. rotulo 1819. This note is copied from the MS. Reports of Judge Blencowe. —For a further enumeration of excepted caſes, *vide Com. Dig. Temps. G.* 9. 6th vol. 3d edit. pa. 339.

See 3 Lev. 264. 1 Roll. R. 365. Moor 576. 5 Mod. 73, 93, 160, 440. 6 Mod. 69, 123, 244, 177. Hard. 56, 210. Cart. 68, 114, &c. S. C. 1 Salk. 76. Vide poſt. 498.

London, and the Cuſtoms thereof.

1. Arnot *verſus* Brown.

[Mich. 7 W. 3. B. R.]

Court of Aldermen's power concerning new lights, by 19 Car. 2. c. 3. was only during the rebuilding of the city. Stopping lights, ſee 1 Sid. 167. Poph. 170. 9 Co. 58. Hob. 131. Hutt. 136. 1 Lev. 239, 248. Raym. 87. 1 Mod. 55. 2 Lev. 193. 1 Vent. 274. 6 Mod. 166, 193, 314, 382, 386. 1 Lutw. 382, 386.

ARNOT and *Brown* were owners of two contiguous houſes. *Brown* had lights in his houſe towards *Arnot*'s yard, and *Arnot* made up blinds. The Court of Aldermen, upon 19 *Car.* 2. *c.* 3., ordered they ſhould be abated; but a prohibition was granted in *B. R.*; for whatever they may do in their inner court by *quod permittat*, where they have power to determine real actions; it is plain that the Court of Aldermen have no power in this ſummary way, unleſs by 19 *Car.* 2. *c.* 3., and that gave them only a temporary power during the rebuilding of the city. While the city was rebuilding they had power to aſſign lights; but by being once aſſigned, the party gained a legal title to them, and may maintain an action at common law for the obſtruction, and the Court of Aldermen have no farther power. *Vide Reſiduum*, 6 *Mod.* 244.

2. Domina Regina *verſus* Rogers.

[Trin. 1 Ann. B. R. 2 Ld. Raym. 777. S. C.]

S. C. Fareſl. 28. See 1 Mod. 35. & prox. pag. 5 Mod. 75, 94, 440. 2 Lev. 200. 6 Mod. 124. Holt 331.

Cuſtom to puniſh by information in the Court of Aldermen, for aſſault and contemptuous words of an alderman in execution of his office, is good. Otherwiſe, if to diſfranchiſe.

UPON a *certiorari*, the cuſtom of *London* was returned, *viz.* That if any citizen ſpeaks contemptuous words of an alderman, or aſſaults him in the execution of his office, an information ſhall be exhibited againſt him in the name of the common ſerjeant in the Court of Aldermen, and that they ſhould proceed againſt him to fine him; and that, at a wardmote held by Sir *Robert Jeffreys*, the defendant aſſaulted him, and ſaid, *I have as much to do here as you; you think ſure you are among your Bridewell birds, but you are miſtaken;* for which an information was exhibited by the common ſerjeant. *Et per Cur.* It had been doubtful if the offence had been by words only, becauſe no indictment lay at common law, but he is to be bound to good behaviour; yet for aſſault he is puniſhable, and that may be by information there by the cuſtom, as well as in *B. R.* by the courſe of the Court, though the regular courſe at common law is by indictment. 2dly, The Court held, that the information lay in the Court of Aldermen, though an alderman was grieved; otherwiſe of the mayor, for he is an integral part, without which the court cannot be held, but the other may be ſevered, and he muſt not ſit; ſo the mayor and aldermen may grant to an alderman, but the aldermen and city cannot grant to the mayor: But the Court held, that a cuſtom to disfranchiſe for contemptuous words ſpoken of an alderman, was void, according to 2 *Lev.* 200.

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Poſt. 697 3 Cro. 78. 1 Vent. 16. 1 Sid. 65. 1 Mod. 35. 3 Mod. 139, 133. Fareſl. 28. 6 Mod. 124. 4 Mod. 341, 2. 1 Vent. 302, 327. 3 Keb. 764, 714, 799, 811. 2 Keb. 594 2 Lev. 200, 1 Vent. 16, 327. 2 Jo. 229. 2 Cro. 58. Hob. 62. 8 Co. 116. 3 Cro. 73. Sheph. Abr. 436. Lev. 398. Corporations 13, 24.

Cuſtom of LONDON concerning Orphans and Freemen's Eſtates.

Vide Com. Dig. Guardian, G. 2. vol. 4. 3d edit. pa. 284.

If a freeman of *London* has no wife, but has children, the half of his perſonal eſtate belongs to his children, and the other half the freeman may diſpoſe of; ſo if the freeman has a wife and no children, half of his perſonal eſtate belongs to his wife, and the other half he may diſpoſe of (*a*). But if a freeman hath a wife and children, one third part belongs to the wife, and another third part to the children, and the freeman may diſpoſe of the other third part. And if ſuch freeman dies inteſtate, the cuſtom affects only two thirds, and the remaining third is ſubject to the ſtatute of diſtributions, and ſo dividing the whole

See 1 Cro. 347. 1 Lev. 227. Raym. 4, 116. 1 Keb. 868. 2 Lev. 32, 130. 1 Mod. 77, 78, &c. 2 Show. 174, 489, 497. 2 Chan. Cas. 170, 161. 1 Chan. Cas. 199, 285, 310. Ven. 134. Com. 465. Skin. 25, 41.

(*a*) *Adm.* 1 *P. Wms.* 341.

into ninths, four ninths belong to the wife, and five ninths belong to the children.

Cuſtom extends only to children, not grandchildren.

If a freeman of *London* has two ſons, and the eldeſt ſon dies leaving a ſon, and then the freeman dies, the grandchild, though in law a repreſentative of the ſon, who never was advanced, has no part by the cuſtom; for the cuſtom of *London* extends only to the children, and not to the grandchildren; *per Northey*; and ſo it has been certified by the recorder into Chancery.

Hotchpot extends only amongſt children. Vern. 397. 2 Wms. 526.

If a freeman of *London* has but one child, and he has received ſome portion from his father, and the father dies, leaving this child and a wife, the child ſhall have his full orphan's part, without any regard to what he has already received; for that advancement in part is only to be brought into hotchpot with children, and not with others. *Per* Sir *Edward Northey*.

Where it appears under the father's hand how much a child has received, the Court will judge whether full advancement, or not, Vern. 89, 216. Vide act of parliament 11 Geo. 1., by which power is given to freemen to diſpoſe of perſonal eſtates by will.

If a freeman of *London* has advanced any of his children with a portion; yet if it appears what that portion was by any writing under the father's hand, or by the father's will, or his marriage-ſettlement, and by the ſaid will or ſettlement it is ſaid, that the ſaid portion is or was in full of his child's part by the cuſtom; yet this child ſhall come in for the cuſtomary * part of the reſt of the father's perſonal eſtate, bringing the portion already received into hotchpot; otherwiſe it is, if it does not appear under the father's hand what the advancement was.

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Vide 4 Co. 124, &c. 6 Co. 69. 8 Co. 170. 9 Co. 31.

Lunatic, Ideot.

1. Hard's *Caſe*.

[Mich. 8 Will. 3. B. R.]

Maintainable by the pariſh where the father is ſettled, not where born. Vide poſt. 528, 485. pl. 43. Comberb. 380, 381. Mod. Caſes 87.

SIR *Bartholomew Shower* moved to quaſh an order o juſtices, for removing an ideot to the place of the laſ legal ſettlement of his father, comparing it to the caſe o a baſtard, who is to be maintained by the pariſh where h is born. *Sed per Holt*, C. J. The father of an ideot ough to maintain him, and if he cannot, the pariſh or plac where his father is ſettled. There is no difference betwee an ideot and any other poor child. The caſe of a baſtar differ

differs, for the reaſon of that is, becauſe he has no father, or rather none that the law looks upon as ſuch; and therefore, till 18 *Eliz. c.* 3., the pariſhes where they were born were bound to maintain them. *Adjournat.*

2. Thompſon *verſus* Leach.

S. C. poſt. 565, 576, 675.

[Hill. 9 Will. 3. B. R. 1 Ld. Raym. 313. S. C. Comyns 45. S. C.]

A Tenant for life, being *non compos*, with remainder to his firſt ſon in tail, remainder to *B.* in fee, ſurrendered by deed of ſurrender to *B.* before he had a ſon; this deed of ſurrender was held abſolutely void, and the contingent remainder not deſtroyed.

His deed is void. Vide Lutw. 1188. S. C. Eq. Ab. 178. p. 3. 3 D. 164. p. 13. 3 Salk. 300. 1 Show. 296.

Caſes B. R. 175. 3 Mod. 296, 301. 3 Lev. 284. Caſes in Parl. 150. 2 Vent. 198. Comb. 438, 468. Carth. 211, 250, 435. Holt 357, 623, 665. Fearne 467, (243).

Mandamus.

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Vide 1 Lev. 23, 65, 75, 91, 119, 123, 148, 187, 162. 2 Lev. 14, 18, 238. 3 Lev. 309. 1 Mod. 82. 3 Mod. 265, 332, &c. 4 Mod. 233, 234, 260, 281, 368. See pag. 430. pl. 8.

1. Anonymous.

[Mich. 8 Will. 3. B. R. S. C. 1 Ld. Raym. 125., by the name of Green *v.* Pope.]

IN an *action on the caſe* in the Common Pleas, for a falſe return of a *mandamus*, judgment was given for the plaintiff upon demurrer; and now Serjeant *Pemberton* came into *B. R.* and prayed a peremptory *mandamus*; but it was denied; for *per Holt*, C. J. Every *mandamus* recites the fact, *prout conſtat nobis per recordum.* How can we ſay that, in this caſe, we cannot take notice of the records of the Common Pleas? You might have brought your action here.

No peremptory mandamus upon an action for a falſe return brought in C. B. S. C. 5 Mod. 316. Comb. 400, 419. Holt 438.

2. Dominus Rex *verſus* The Mayor and Burgeſſes of Wilton.

[Mich. 8 Will. 3. B. R. S. C. 1 Ld. Raym. 225., by the name of Rex *v.* Chalke.]

Want of ſummons is no objection, if the perſon appeared and was heard. Vide poſt. 435. S. C. 5 Mod. 255, 257. Bur. 731.

A *Mandamus* iſſued to reſtore *Elias Chalk* to the place of a burgeſs of *Wilton*, to which was returned a cuſtom for the mayor and burgeſſes to remove for miſbehaviour: They then ſet forth ſeveral inſtances of miſbehaviour; and that he being thereupon fully heard to all that was objected in the common council of the mayor and burgeſſes, and it being fully proved upon him, they turned him out. It was objected, that it was not ſaid he was ſummoned. *Vide Style* 51, 446, 452. 3 *Bulſt.* 189. 2 *Keb.* 489. *Per Cur.* The end of the ſummons is, that he may be heard for himſelf, and therefore where he has been heard, want of ſummons is no objection; but this was afterwards determined on other objections.

Vide 4 Mod. 233, &c.

3. Dominus Rex *verſus* The Mayor, &c. of Oxon.

[Mich. 8 Will. 3. B. R.]

Where an officer at will is removed, and the corporation does not rely upon their power, but return a miſdemeanor, and that is inſufficient, peremptory mandamus ſhall iſſue.

* [429]

A *Mandamus* iſſued to the mayor and commonalty of *Oxford* to reſtore *Slatford* to the office of town-clerk; they returned their charter of incorporation, which gives them power to chooſe a diſcreet perſon to be town-clerk, to hold at the will of the mayor and aldermen: the 13 *Car.* 2. *ſtat.* 2., and the ſtat. of *W.* & *M.* about taking the oaths, and that the office of town-clerk being * void, they choſe *Slatford*, and that he took the oaths of office *coram nobis majore & ballivis*; but did not *coram nobis majore & ballivis* take the oath of allegiance, *per quod* his office became void, *& eâ ratione*, &c. Upon which theſe three points were ſtirred and ſettled:

1 Vent. 82. Vide Raym. 212. 2 Saund. 289. 2 Show. 68, 475. 4 Mod. 233, 237, 239. 5 Mod. 432, 433, &c. 3 Mod. 72, 118. Poſt. 432.

1ſt, Whether the party that comes in is to take the oaths at his peril, or they are to tender them, and if he refuſed, whether it muſt not appear upon the return? *Et per Cur.* He muſt take them at his peril; the magiſtrate need not tender to him, but he muſt tender himſelf to the magiſtrate, and demand them; and if it be refuſed, muſt ſue a *mandamus*, and the magiſtrate is puniſhable (*a*); if the law were otherwiſe, it would be in the power of the magiſtrate to elude the act in favour of the party.

(*a*) If he does not tender them *ex officio*. *Per Holt. Cumb.* 419.

2dly, Whether

2dly, Whether it be enough to ſay, he did not take the oaths before them? And this was held naught; for two juſtices have a power to adminiſter the oath, and he might take the oath before them.

3dly, Whether a perſon, that was only tenant at will ſhould have a peremptory *mandamus? Et per Cur.* We do not determine whether there ought to be a good cauſe, or not, for ſuch removal; but ſuppoſe it may be without cauſe, yet ſtill they muſt determine their will: Now they do not return a determination of his office by their will, as the reaſon why they do not admit him, but the ſpecial matter of his not taking the oaths; therefore, ſince his office continues, and this excuſe is inſufficient, he ought to be reſtored. A peremptory *mandamus* was granted. *Vide* Serjeant *Whitacre*'s caſe. Str. 674.

4. The Mayor of Coventry's *Caſe.*

[Hill. 9 Will. 3. B. R.]

A *Motion* was made for an attachment, for not returning an *alias mandamus*. *Et per Holt*, C. J. In caſe of a *mandamus* out of Chancery, no attachment lies till the *pluries*, for that is in the nature of an action to recover damages for the delay; but upon a *mandamus* out of this court, the firſt writ ought to be returned (*a*); yet an attachment is never granted without a peremptory rule to return the writ, and then an attachment goes for the contempt; and in this caſe a peremptory rule was made. The firſt writ ought to be returned. Mod. Caſes 25. Poſt. 434. Skin. 669. Pal. 455.

(*a*) This is expreſsly required by ſtat. 9 *Ann.* ch. 20. ſ. 1. 11 G. 1. ch. 4. ſ. 9.

5. Dominus Rex *verſus* The Mayor, &c. of Coventry. [430]

[Mich. 10 Will. 3. B. R. 1 Ld. Raym. 391. S. C.]

MANDAMUS to reſtore *J. S.* to be one of the common-council houſe; the defendants returned, that they were an ancient corporation, and that the king by his letters patent, reciting their cuſtoms, amongſt which was this of electing perſons to be of the common-council houſe, and removing them *ad libitum*, did grant and confirm all their liberties, cuſtoms, *&c.*; and that they by force of the ſaid cuſtom time out of mind uſed, *& ſecundum formam literarum patentium prædict.* did remove him: And firſt, it was agreed, that the eſtate, whether by cuſtom or charter, has this condition annexed to it, that the Cuſtom to remove ad libitum, good, but that muſt be returned poſitively. See 4 Mod. 34, 36, 233. 5 Mod. 239, 431, &c. Raym. 235, 439. Poſt. 432 in pede. 1 Vent. 143. 2 Keb. 770, 796.

the corporation might diſplace him at will, without aſſigning any cauſe; but this differed from the caſe of the recorder of *Bath*, who was appointed by the commiſſioners for regulating corporations: By their cuſtom they were to chooſe one learned in the law for a recorder; the corporation turned out the Lord *H.*, and returned, he was not learned in the law: and held good; for whoever put him in, he muſt be ſo qualified by the cuſtom, and he might bring an action for a falſe return, if he be a perſon learned in the laws. 2dly, This return was held naught, becauſe it did not appear that the corporation had any ſuch power, but only by the recital; whereas they ſhould have returned, they had ſuch a power poſitively (*a*).

(*a*) In Ld. *Bruce's* caſe, 2 *Str.* 819. the Court ſays, The modern opinion has been, that a power of amotion is incident to the corporation. The ſame doctrine is recognized in the *King* and *Richardſon*, 1 *Bur.* 517., and in the *King* v. *Lyme Regis*, *Doug.* 148.; it was ruled accordingly, that it was not neceſſary to allege in the return to a *mandamus*, that the corporation at large had a power of amotion. It ſhould, however, be obſerved, that thoſe caſes related to removals for corporate offences, and not to removals *ad libitum*.

6. Anonymous.

[Hill. 10 Will. 3. B. R.]

Rule to inſpect the charter, in order to make return, denied, before an action on the caſe brought.

A *Mandamus* was granted to admit *J. S.* mayor. It was moved, that the mayor in poſſeſſion might have a rule to ſee the charter, that he might be able to make a return; for the other who had ſued the *mandamus*, was not rightly elected: But it was denied, for he may return that; and in an action for a falſe return, ſhall have a rule to ſee the charter and take a copy; and it was ſaid, that the Court were always upon that difference (*b*).

(*b*) On a rule to ſhew cauſe why there ſhould not be an information in the nature of a *quo warranto*, the Court made a rule for the defendant to inſpect the charter and corporation books. *Rex* v. *Holliſter*, *Rep. Temp. Hard.* 245. *Vide Rex* v. *Hoſtmen* of *Newcaſtle*, *Str.* 1223 *Rex* v. *Purnell*, 1 *Wilſ.* 329. *Rex* v. *Bridgeman*, *Str.* 1203.

See pag. 428. pl. 1. 4 Mod. 34, 233, 236, 368. Raym. 365.

7. Buckley *verſus* Palmer.

[Trin. 11 Will. 3. B. R.]

After the return falſified, peremptory mandamus is of right. See 6 Mod. 152.

AN action was brought for a falſe return, and a verdict was for the plaintiff, and a peremptory *mandamus* was moved for, and oppoſed, becauſe it was a hard verdict, &c. *Et per Holt*, C. J. When an action is brought for a falſe

falſe return, and that is falſified, we cannot refuſe a peremptory *mandamus*. *Sed nota*; This motion cannot be made till four days are paſt after the return of the *poſtea*; becauſe the defendant has ſo long to move in arreſt of judgment. *Paſ.* 12 *W.* 3. *B. R.* The caſe of the city of *Exeter*.

Information for a falſe return, &c. Comber. 400. S. C. Holt 440. See 1 Salk. 77, 78. Skin. 670. Str. 983. Str. 697. Vide ſt. 9 Ann. c. 20. Com. Mandamus, D. 6. 5th vol. 3d ed pa 38.

8. Dominus Rex *verſus* The Bailiffs and Burgeſſes of Malden.

[Trin. 11 W. 3. B. R. 1 Ld. Raym. 481. S. C.]

A *Mandamus* iſſued, reciting *quod cum* they ought to chooſe yearly two bailiffs, out of ſuch as had not been bailiffs for three years before, *ideo* they were commanded to chooſe. They returned their conſtitution by letters patent to be, to chooſe two *ex aldermannis*, and that they had choſen two *ſecundum formam & effectum literarum patentium* generally; and this was held naught, for they ought to deny their conſtitution to be as is mentioned in the writ, or ſhew a compliance with the writ; whereas they have acted according to a conſtitution ſet forth in the return different from the writ, and do not deny the ſuppoſal of the writ; wherefore a peremptory *mandamus* was granted.

Where the return ſpeaks of a conſtitution different from the writ, it ought to deny the ſuppoſal of the writ. 4 Mod. 34, 122, 136, 233. Poſt. pl. 16. Cro. Car. 135.

9. Dominus Rex *verſus* The Mayor, &c. of Abingdon.

S. C. poſt. 432, 699. Carth. 499. Caſes B. R. 401.

[Mich. 11 Will. 3. B. R.]

A *Mandamus* was granted to the mayor, bailiffs, and burgeſſes of the town of *Abingdon*: The mayor made a return and brought it into the crown-office, intending to move to have it filed; and now a motion was made to ſtay the filing of it, upon ſuggeſtion, that this return was made by the mayor and minor part of the bailiffs and burgeſſes, and againſt the conſent of the greater number, who would have obeyed the writ; and therefore they prayed they might diſavow this return and put in another. *Et per Holt*, C. J. Where a writ is directed to a ſingle officer, as a ſheriff, and a return is made by a ſtranger, without his privity, he may any time that term wherein the writ is returned, come in and diſavow it, but not after the term. *Dy.* 182. But in this caſe, where the writ is directed to ſeveral, and the mayor, who is the moſt principal and proper perſon, returns and brings in the writ, it is not fit that we ſhould examine upon affidavits,

Mandamus directed to the mayor, bailiffs, &c. Mayor alone may make the return, and the others cannot diſavow; but he is puniſhable, if againſt the conſent of the majority. Vide poſt. 479, 699, 701. Carth. 499, 500. Comber. 41, 213. 6 Mod. 133. Rep. B.R. Temp. Hard. 188.

davits, whether there was the conſent of the majority. We will take it, and leave you to to puniſh the mayor for this miſdemeanor, if he be guilty; for it is a great crime, which will not only merit a heavy fine, but a peremptory *mandamus* will be granted, if the return be falſified. If they were all equal parties, this might be
[432] another caſe: The return was filed, and at the ſame time leave was given to file an information againſt the mayor.

10. Dominus Rex *verſus* The Mayor, &c. of Norwich.

[Hill. 11 Will. 3. B. R.]

S. C. poſt. 436. Holt 444. A *Mandamus* was granted to the mayor, *&c.* of *Norwich*; it was moved, that the ſenſe of the mayor differed from the majority of the corporation, and that he would execute the writ, whereas the corporation were for Carth. 500, 501. returning an excuſe, *&c.*; and they prayed, that the mayor might be ordered to deliver the writ to the reſt of the corporation: *Sed non allocatur;* for he is the head and Vide 2 Bur. 798. principal, and take your courſe againſt him (*a*).

(*a*) Which may be by way of information, *prout ſupra.*

S. C. ante 431. Poſt. 699.

11. Dominus Rex *verſus* The Mayor, &c. of Abingdon.

[Paſch. 12 Will. 3. B. R. 1 Ld. Raym. 559. S. C.]

Return, that A. was elected a burgeſs, but did not receive the ſacrament within a year before, per quod the election was void, and he is not a burgeſs, ill. Ante 428, 429. 4 Mod. 233. 3 Mod. 72, 118. 5 Mod. 432, 433, &c. 2 Show. 68, 475. 2 Saund. 289.

A *Mandamus* was directed *majori ballivis & omnibus principalibus burgenſibus burgi de A.* (except *R.* and *S.*), ſetting forth the conſtitution, and that *R.* and *S.* were capital burgeſſes, choſen by the commonalty to ſtand and ſerve for mayor for the enſuing year; and that they were to chooſe one of them, *ideo* they were commanded to elect one of them accordingly. They returned the ſtatute 13 *Car.* 2. *ſeſſ.* 2. *c.* 1., and that within twenty years, *prox. poſt* 25 *March* 1663. *R. & S. fuerunt electi burgenſes principales*, and within a year before their election had not received the ſacrament, *per quod electio eorum vacua devenit & non ſunt principales burgenſes;* and this return was held naught: 1ſt, The Court conſidered it without the laſt words, *et non, &c.* And as to that the Chief Juſtice ſaid, the writ ſuppoſes them to be burgeſſes, and ſo the Court muſt intend them; and this is not anſwered by the ſpecial matter of the return, which ſhews only that he was once elected, and that was a void election; whereas he might qualify himſelf and be choſen again; and here is nothing to exclude the intendment of a ſubſequent election, which is according to the ſuppoſal of the writ.

2dly, The

2dly, The Court conſidered it with the laſt words, and held the *et non ſunt principal. burgenſes, &c.* to be only part of the concluſion or inference; and the Chief Juſtice ſaid, the law requires the moſt exact certainty in theſe caſes, becauſe the party cannot traverſe nor interplead (*a*); and it is not enough to offer a matter, ſo that the party may be able to falſify it in an action; but the matter muſt be ſo alleged, that the Court may be able to judge of it and determine, whether it be a ſufficient cauſe, or not. If the matter ſet forth in this return had been ſo alleged in a plea in bar, the plaintiff might have replied a ſubſequent election: *Ergo* this return is uncertain, for there might have been a ſubſequent election.

Return muſt be certain to every intent. Vide ante 430. pl. 5. &c. ib. poſt. 436, 586, 589. Mod. Caſes 89.

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(*a*) By ſtat. 9 *Ann.* ch. 20., the perſons ſuing the *mandamus* may plead to, or traverſe all or any of, the material facts contained in the return; to which the perſons making the return may plead, take iſſue, or demur. In *Rex* v. *Lyme Regis*, *Doug.* 148. Lord *Mansfield* ſays, he takes it to be ſettled, that the ſame certainty is required now as before that ſtatute; though at firſt it might have been otherwiſe determined, becauſe the reaſon was not the ſame. *Buller*, J. ſaid, that a certainty to a certain intent in general is all that is requiſite; which means what, upon a fair and reaſonable conſtruction, may be called certain, without recurring to poſſible facts which do not appear. *Vide* *Rex* v. Mayor of *Liverpool*, 2 *Bur.* 731. *Rex* v. Bailiffs of *Morpeth*, 1 *Str.* 58.

12. Dominus Rex *verſus* The Mayor, &c. of Rippon.

[Paſ. 12 Will. 3. B. R. 1 Ld. Raym. 563. S. C.]

MANDAMUS was directed to the mayor, aldermen, and commonalty of *Rippon*, to reſtore Sir *Jonathan Jennings* to his place of alderman of *Rippon*; they returned themſelves to be incorporated by another name, *viz.* mayor, burgeſſes, and commonalty; and farther, that Sir *Jonathan Jennings*, at ſuch a time, at an aſſembly of the corporation, came *& perſonaliter libere & debito modo reſignavit* his office, declaring he would continue to ſerve no longer in that office; whereupon they choſe another in his room: And this declaration in a corporate aſſembly was held good, eſpecially ſince the corporation accepted it, and choſe another in his place; but till ſuch election he had power to waive his reſignation, not afterwards (*b*); and whether a deed was neceſſary, or not neceſſary, is not material, becauſe they have poſitively returned *quod reſignavit*, which is falſe, if a deed was neceſſary, and there was none. Alſo the Court held the writ naught, becauſe it was directed to the corporation by a wrong name; but

Return of a reſignation in the corporate aſſembly and election of another into the office, good. 1 Vent. 29. 1 Lev. 148. 2 Show. 66. 1 Sid. 14.

Carth 502. Poſt. 700. Str. 55.

(*b*) *Vide Rex* v. Mayor, &c. of *Cambridge*, *Comp.* 532.

refuſed

refuſed to grant a new writ of *mandamus*, becauſe an action lay againſt the particular perſons for the falſe return of this: *Ergo* a new one would be vexatious.

13. The Caſe of Andover.

[Mich. 12 Will. 3. B. R.]

Several perſons cannot join in a mandamus to reſtore. See 5 Mod. 10, 11. 1 Sid. 209. Poſt. 43, 67, 436. Comber. 307, 308. 6 Mod. 18. 1 Shower 258, 260, 281, 364. Far. 83. S. C. Holt 441. 1 Bl. Rep. 60. Str. 578.

FIVE perſons cannot have *one* writ of *mandamus* to be reſtored; for though the end of the writ is to do juſtice, yet the foundation is the wrong in turning them out, and the turning out of one is not the turning out of another; nor can ſeveral perſons join in an action on the caſe for a falſe return. *Per Holt*, C. J.

14. Domina Regina *verſus* Twitty and Maddicot.

*[434]

[Mich. 1 Ann. B. R.]

Non fuit debito modo elect. not a good anſwer, unleſs the writ ſuggeſts, debito modo. S. C. Far. 83. Holt 442. 5 Mod. 10, 11. 12 Mod. 2. Carth. 170. Ld. Raym. 1379, 1405. 2 Bur. 1013. Str. 225. And. 105. Doug. 79. Com. Mandamus D. 5. 5 vol. 3d edit. pa. 37.

MANDAMUS to ſwear *A.* and *B.* churchwardens, ſuggeſting that they were *debito modo electi:* The return was, *quod A. & B. non electi fuerunt debito modo.* It was objected, that it ought not to be *debito modo;* and it ought to be in the disjunctive, *nec eorum alter elect. fuit. Sed per* * *Holt*, C. J. it was reſolved, 1ſt, That one cannot be ſworn upon this writ; for either both were choſen, or the writ is miſconceived (*a*). 2dly, Where the writ is to ſwear one *debito modo electus, quod non fuit debito modo elect.*, is a good return, for it is an anſwer to the writ; but where it is to ſwear one *electus* churchwarden, there *quod non fuit debito modo elect.* is naught, becauſe it is out of the writ, and evaſive.

(*a*) *R. contr.* 2 Ld. *Raym.* 1008.

Q. 6 Mod. 25.

15. Anonymous.

[Mich. 4 Ann. B. R.]

How many days between the teſte and return. Ante 429. Pal. 455.

A Rule was made the firſt day of this term, *viz.* That if the corporation to which the *mandamus* is ſent be above forty miles from *London*, then there ſhall be fifteen (*b*) days between the *teſte* and the return of the firſt writ of

(*b*) The rule here meant was produced in the caſe of *Rex* v. *Maj. et Jur. de Dover*, *Str.* 407. It appeared to be *fourteen*, and not *fifteen* days, as here

of *mandamus*; but if but forty miles, or under, but eight days only: And as to the *alias* and *pluries*, they made no rule, but would conſider of that, and that the writ ſhould not be teſted before it was granted by the Court; ſo that the *alias* and *pluries* may be made returnable *immediate*, as they uſed to be: Alſo the Court ſaid, that at the return of the *pluries*, if no return was made, and there was an affidavit of the ſervice, there ſhould go an attachment without hearing counſel to excuſe the contempt.

here ſtated. It had the words *ad minus*: Accordingly it was ruled in the ſaid caſe in *Str.*, that *fourteen* days was the proper time; the one to be incluſive, and the other excluſive; ſo that a writ *teſted* the 14th may be returnable the 28th.

16. Domina Regina *verſus* The Bailiffs, &c. of Ipſwich.

[Serjeant Whitacre's *Caſe*, Hill. 4 Ann. B. R. 2 Ld. Raym. 1233. S. C.]

A *Mandamus* was directed *ballivis, burgenſibus, & communitat. villæ de Gippo*, to reſtore Serjeant *Whitacre* to the office of recorderſhip; the return was, *reſponſio ballivorum, burgenſium, & commun. villæ de Gipwico, ſive burgi Gipwici patet, &c. nos ballivi, &c.*, return the conſtitution ſo and ſo; and that the recorder is amoveable *pro malegeſturis per ballivos & burgenſes vel major. partem eorum quorum ballivos duos eſſe volumus*: Then they ſhew Serjeant *Whitacre* choſen to continue *ad libitum*, and that at ſuch a ſeſſions of the peace the ſerjeant had notice, but did not attend; and that having notice to anſwer, he appeared and anſwered, and by the bailiffs, burgeſſes, and commonalty, (the bailiffs being then preſent,) he was turned out of his ſaid office. *Et ulterius certificamus quod inhabitantes villæ prædict. nunquam nuncupati fuerunt per nomen ballivorum, burgenſ., & com. villæ de Gippo, &c.* This caſe pended long, and was often argued upon ſeveral objections; and, 1ſt, The Chief Juſtice held, that *Gippus* and *Gipwicus* were different names, ſo that the writ was miſdirected; but then they ſhould have returned the ſpecial matter accordingly, and relied upon it; for that now they had admitted themſelves to be the corporation to whom the writ was directed, by returning *executio, &c.* And a corporation may have ſeveral names; and here it being ſtarted, Whether a corporation ſhould loſe its old name by a new charter? the Chief Juſtice ſaid, It would, where the new charter altered the very conſtitution in the integral parts of it; as if bailiffs and burgeſſes are made mayor and alder-

Variance between the writ and return in the name of the corporation. Vide poſt. 452, 658, & ante pl. 8. 1 Salk. 145, 146, 151. 1 Sid. 64. Hard. 97. 1 Lev. 50. S. C. Rep. A. Q. 67. Holt 443, 445. Mod. Caſes 128.

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men,

men, or mayor and burgeſſes, or where an abbot and convent are tranſlated into a dean and chapter; but if the bailiffs and burgeſſes *villæ de Gippo* accept a charter, conſtituting them bailiffs and burgeſſes *villæ Gipwici*, and giving them farther privileges, and that they ſhall be ſo called; this is a new name only, for the old corporation remains in the integral parts of it. *Powell* being not ſatisfied in the firſt point, it vaniſhed without reſolution, by diſcovering that *Gippo* in the latter end of the return was with a daſh, and in the writ without, ſo that then it was not *ad idem*. 2dly, The whole Court held, that though the bailiffs were only ſaid to be preſent, they ſhould be intended to be conſenting, either actually, or as included in the major part. 3dly, That the recorder (*a*) is bound to attend and aſſiſt at the ſeſſions to direct the corporation in the proceedings of juſtice, and that his office being a public office relating to juſtice, non-attendance is a good cauſe of forfeiture. 4thly, Though the ſummons or notice Serjeant *Whitacre* had to anſwer this charge ſet no time when he ſhould appear, yet his appearing and anſwering cured the defect of notice in the time, and would have cured want of notice of the charge. *Palm.* 453. For though a man ought to be prepared, and have convenient time for that, yet he may waive this benefit if he will; but in this caſe, his notice was to anſwer his non-attendance at a ſeſſions of *oyer* and *terminer*, and therewith he was charged; whereas he is turned out for non-attendance at a ſeſſions of peace, and indeed anſwered to that, though not charged therewith; which the Court held incurable and fatal, and ordered a peremptory *mandamus*, and that it ſhould be directed according to the firſt writ, *viz. Villæ de Gippo*, and muſt not differ; and though Mr. *Raymond* objected to a peremptory writ, becauſe he was only recorder *ad libitum*, (1 *Sid.* 14.) *non allocatur*; for the corporation have not returned that; they have relied upon his miſdemeanors, and not upon their power.

Hard. 504.

1 Sid. 461.
2 Cro. 500.
Raym. 188.
1 Lev. 148.
1 Vent. 82.

Non-attendance a good cauſe of forfeiture of the office of recorder.

Bur. 1999. Defect of notice is cured by appearance. Ante 428. Str. 261.

A motion muſt be for the matter charged.

Ante 429.

(*a*) In the caſe of *the King* v. *the Corporation of Wells*, 4 *Bur.* 1999., it was held, that a general neglect or refuſal to attend the duty of a recorder is a reaſon of forfeiture; a determined neglect, a wilful refuſal. But it is otherwiſe with reſpect to a ſingle inſtance of omitting to attend, when no particular buſineſs was expected, nor in fact happened.

17. Domina Regina *verſus* The Mayor and Aldermen of Norwich.

[Paſ. 5. Ann. B. R. 2 Ld. Raym. 1244. S. C.]

MANDAMUS to admit *Dunch* to be an alderman of *Norwich*; they returned the charter of *E.* 4. *Quod aldermani onerentur & exonerentur prout in London.*; and that in *London*, if a perſon be elected alderman by the ward, the Court of aldermen may refuſe him; and that *D.* was elected by the ward, but refuſed by the mayor and aldermen, becauſe he had not received the ſacrament *infra annum tunc prox. antecedent. electionem ſuam*; and that he was turbulent and factious, and procured his election by bribery; *et quod non fuit electus*. The Court agreed that ſeveral cauſes might be returned, and that either, not qualified, or not elected, had been a good return; but the Chief Juſtice queſtioned whether bribery would vacate the election, becauſe it did not appear to be an office concerning the adminiſtration of juſtice, and within the ſtatute *E.* 6. Alſo the whole Court agreed, that as ſoon as *D.* was choſe by the ward, it was an election, and that the aldermen did not chooſe, (having but one perſon ſent them,) but approve; and that before approbation, the election was complete; as a preſentation is before the biſhop approves a clerk; or as a nomination is a perfect nomination before the other preſents. It follows then, that this return is repugnant, and the Court cannot tell what to believe; for at firſt they admit an election, and avoid it; and yet at laſt they return, there was no election at all. A peremptory *mandamus* was granted (*a*).

Several matters may be returned, but they muſt be conſiſtent. Vide poſt. 586, 589. 1 Show. 180. 3 Lev. 46. Lutw. 130. Mod. Caſes 211. 3 Mod. 114. Ante 432. S. C. Holt 444.

Election in one body; approbation in another.

(*a*) Return that the perſon was not elected; and alſo that it was neceſſary for perſons elected to be approved by the lord of the manor, which he was not, is good and conſiſtent, *Wright* v. *Fawcett*, 4 *Bur.* 2041. So a return that the party was not duly elected, and that there was a cuſtom to remove *ad libitum*, according to which he was removed; for he might be in poſſeſſion *de facto*, and either ground would juſtify his removal, *Rex* v. *Churchwardens of Taunton*, *Cowp.* 413. Where two cauſes returned are inconſiſtent, the whole muſt be quaſhed; becauſe the Court cannot know which to believe; and it is an objection to the whole return. But if, of cauſes not inconſiſtent, ſome are good and others are bad, the Court may quaſh the bad, and ſend the good to trial, *Rex* v. *the Mayor of Cambridge*, 2 *T. R.* 456. *Vide Rex* v. *the Mayor of York*, 5 *T. R.* 66.

18. Domina Regina *verſus* The Mayor, &c. of Derby.

[Mich. 6 Ann. B. R.]

Writ to one to command another to do the act, ill. Vide poſt. 489. pl. 51. 493. pl. 60.

MANDAMUS to the mayor, aldermen, and capital burgeſſes of *Derby*, *viz.* Whereas *A.* and *B.*, *&c.* removed the party complaining from his office of burgeſs, commanding them to command *A.* and *B.* to reſtore him, was quaſhed; for it is abſurd that the writ ſhould be directed to one perſon to command another.

Vide ante 433. pl. 13.

19. Anonymous.

Several ought not to join in a writ to be reſtored. 2 Lev. 27, 288. 5 Mod. 11. See 1 Sid. 209. 5 Mod. 10, 11. Ante 433 pl. 13. 2 Saund. 116. 1 Vent. 167. 1 Lev. 109. Str. 578.

A *Mandamus* went to reſtore nine perſons to the place and office of common council-men; the conſtitution was returned, and that theſe nine were *debite amoti*. *Holt*, C. J. The writ ought to be quaſhed; there ought not to be nine perſons in one writ; the amotion of one is not the amotion of another; their intereſts are ſeveral, and they may have been removed for ſeveral different cauſes; one for one fault, and another for another. How can we grant a joint reſtitution to them? *Eyre* was of the ſame opinion.

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See 3 Lev. 364, 376, 421.

Marriages.

2 Show. 50. S.C. Comb. 131.

1. Alleyne & Ux. *verſus* Grey.

[Trin. 1 W. & M. B. R.]

In debt by baron and feme; ne unques accouple is no plea. Doct. placit. 378. See 2 Lev. 41. 1 Sid. 23, 64, 387. 2 Rol. Abr. 551. pl. 1. 1 Keb. 41. Andrews 22.

IN *debt* on a bond, the defendant pleaded *ne unques accouple in loyal matrimony*; plaintiff demurred, and had judgment, for it alters the trial; inſtead of trying *per pais*, it puts the trial on a certificate from the ordinary; and, 2dly, It admits a marriage, but denies the legality of it; whereas a marriage *de facto* is ſufficient, and, whether legal or not legal, is nowiſe material.

2. Jeſſon *verſus* Collins.

6 Mod. 155. S. C. Holt 158.

[Paſ. 2 Ann. B. R.]

MR. *King* moved for a prohibition to ſtay a ſuit in the Spiritual Court, upon a contract of marriage *per verba de præſenti*, ſuggeſting that the contract was in fact *per verba de futuro*, for which, if not performed, the party had remedy at common law. *Holt*, C. J. ſaid, that though it were *per verba de futuro*, yet it was a matrimonial matter, and the Spiritual Court had juriſdiction; and this was the great objection againſt actions at law, when firſt brought up in theſe caſes; but in anſwer to this it was held, that the remedy in the Spiritual Court was waived by betaking himſelf to damages for the breach: Alſo he ſaid, that a contract *per verba de præſenti*, was a marriage, *viz. I marry you: You and I are man and wife;* and this is not releaſable: *Per verba de futuro; I will marry you. I promiſe to marry you*, &c., which do not intimate an actual marriage, but refer it to a future act; and this is releaſable; and as it is releaſable, the party may admit the breach and demand ſatisfaction. He alſo ſaid, he remembered this caſe upon evidence; *aſſumpſit*, in conſideration that the plaintiff promiſed to marry the defendant, the defendant promiſed to marry him; upon evidence it was proved, that there was a promiſe; yet the defendant producing a ſentence in the Spiritual Court, in diſaffirmance of that contract, it was held good counter-evidence, and the plaintiff was nonſuit. A prohibition was denied.

Contract per verba de præſenti, or de futuro, equally cognizable in the Spiritual Court, and their ſentence binding. Vide 3 Mod. 165. 5 Mod. 411. 2 Lev. 15, 16. 6 Mod. 155, 172. 5 Rep. 51. 3 Lev. 65. 1 Salk. 24, 25. 3 Lev. 65. Vi. Lutw. 68, 78, 79.

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See 2 Lev. 15, 16. acc. Str. 961.

3. Wigmore's *Caſe*.

See 6 Mod. 155, 172.

[Mich. 5 Ann. B. R.]

THE wife ſued in the Spiritual Court for alimony. In fact, the huſband was an Anabaptiſt, and had a licence from the biſhop to marry, but married this woman according to the forms of their own religion. *Et per Holt*, C. J. By the canon law, a contract *per verba de præſenti*, is a marriage: As, *I take you to be my wife:* So it is of a contract *per verba de futuro, viz. I will take*, &c. If the contract be executed, and he does take her, it is a marriage, and they cannot puniſh for fornication. Upon a prohibition to the Spiritual Court of *Peterborough* (*a*).

Contract per verba de præſenti is a marriage. 3 Lev. 65, 411. 5 Mod. 411. Swinb. de Sponſalib. Cro. El. 79. Holt 459. S. C.

(*a*) By ſtat. 26 G. 2. ch. 33. ſ. 1. marriages muſt be celebrated according to the rules of the church of *England*. Sec. 13. No ſuit ſhall be had in the Spiritual Court to compel a marriage by reaſon of any contract, whether by *verba de præſenti*, or *verba in futuro*, entered into after the 25th *March* 1754. The act does not extend to marriages where both parties are Quakers or Jews, ſec. 18.

Marſhal and Marſhalſea.

See 6 Mod. 57, 225.

1. Anonymous.

[Mich. 9 W. 3. B. R.]

Bond to the marſhal to be a true priſoner, good.

PER Holt, C. J. It was adjudged in the caſe of Sir *Jo. Lenthall* verſus *Cooke*, that the marſhal might take a bond to be a true priſoner; but not to receive or take any thing of advantage or profit to himſelf, and that if he did, the bond was void at common law.

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2. Anonymous.

[Mich. 10 W. 3. B. R.]

Juriſdiction of the Palace Court.

A Prohibition was prayed to the † *Marſhalſea*, becauſe they refuſed to admit a plea, that neither of the parties were *de hoſpitio regis*. *Per Holt*, C. J. This is not the court mentioned in my Lord *Coke*'s caſe of the *Marſhalſea*, If the cauſe of action ariſe within twelve miles of *London*, this Court holds plea, though the parties are not *de hoſpitio regis*; the plea is frivolous, and we will not interpoſe. But *Trin.* 11 *W.* 3. *B. R.* an action of debt was brought in the *Marſhalſea*, on a judgment in *B. R.*, and a prohibition was granted.

† *Nota.* This muſt have been to the Palace Court, where neither plaintiff nor defendant muſt be of the king's houſehold; but, in a ſuit in the Marſhalſea, both muſt be of the king's houſehold.

3. Snow *verſus* Firebraſs.

[Mich. 1 Ann. B. R. 2 Ld. Raym. 804. S. C.]

Earl marſhal of England was formerly marſhal of the King's Bench. 3 Salk. 320. S. C.

A *Scire facias* was brought againſt the bail, and a breach aſſigned in this, that the defendant had not rendered himſelf *priſonæ mar. Mariſc. domini regis*. Mr. *King* objected, that it was not good, without going on and ſaying, *coram ipſo rege exiſtentis*, for the king has another marſhal, *viz.* the marſhal of the houſehold. *Et per Holt*, C. J., and *Powell*, The earl marſhal of *England* was by his office marſhal of the *King's Bench*, as appears by the book of *H. 6.*, and ſo continued till the time of King *James* the firſt, when this

this office was derived out of it; ſo that the marſhal of the king is the marſhal of the *King's Bench*; no body elſe can be underſtood; the other is *mareſchallus hoſpitii*, and never ſpoken of without that addition.

The office of chamberlain of the King's Bench priſon is inſeparably incident to the office of marſhal; and therefore a grant of the office of marſhal, with a reſervation of the office of chamberlain, is void. *Per Holt*, C. J. *Mich.* 3 *Ann. B. R.*

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Maſter and Servant.

1. Boſon *verſus* Sandford & al.

[Mich. 1 W. & M. B. R. Intr. Hill. 1 & 2 Jac. 2. Rot. 302.]

CASE againſt *A.* and *B.*, part-owners of a ſhip, for that he put goods on board, and the defendants undertook to carry them ſafely for hire, but yet were ſo negligent that the goods were ſpoiled. Upon not guilty pleaded, in evidence it appeared, that *C.* and *D.* were alſo part-owners, and that the ſhip was under the care of a maſter, to whom the goods were delivered; and this being found ſpecially, it was argued *pro quer.*, that the action is grounded on the wrong, and may be againſt all, or any of the proprietors. There was alſo another doubt ſtarted, and that was, Whether the owners were liable, when in truth they did not undertake, but in fact the maſter *ſuper ſe ſuſcepit? Eyre*, Juſtice, held there was no difference between a land-carrier and a water-carrier, and that the maſter of a ſhip was no more than a ſervant to the owners in the eye of the law; and that the power he has of hypothecation, *&c.* is by the civil law. *Et per Holt*, C. J. The owners are liable in reſpect of the freight, and as employing the maſter; for whoever employs another is anſwerable for him, and undertakes for his care to all that make uſe of him. 2dly, The Court held, that all the owners were liable, for they are charged, in point of contract, as employers, and are all equally entitled to the freight. Either maſter or owners may bring an action for the freight; but, if the owners bring the action, they muſt all join; *ergo* they muſt all be joined; as the freight belongs to all, ſo all are equally undertaking; and a breach

See Vaug. 242, 243. 2 Lev. 27. 172. 3 Lev. 351. 352. S. C. 1 D. 7. p. 3, 8. p. 6. 3 Mod. 321. 1 Show. 29, 101. Comb. 116. 2 Lev. 256. 2 Show. 478. Carth. 58. 3 Salk. 203. Skin. 278. Holt 648.

Goods are ſpoiled by the default of the maſter of a ſhip, employed by owners; the owners are liable in reſpect of the freight. See 3 Lev. 37, 258. 5 Mod 91, 340. 2 Saund. 260. Poſt. 443. Action lies againſt the owners; 2 Saund. 115.; for he that employs a ſervant, undertakes for him. Vide prox. caſum, 3 Mod. 323. Moll. 208, 209. But the action muſt be brought againſt all the part-owners. 1 Salk. 10, 31. 1 Bulſt. 16. 4 Mod. 17. 3 Mod. 244. 1 Mod. 18. 1 Ld. Raym. 739. Rep. B. R. Temp. Hard. 85, 194.

of truſt in one is a breach of truſt in all; as where two make one officer, the act of one is the act of the other. 3dly, The Court held this was not an action *ex delicto*, but *ex quaſi contractu*, and it was not the contract of one but of all: That there was no other tort but a breach of truſt. Therefore the Court gave judgment for the defendant, becauſe all the owners were not joined (*a*).

(*a*) But a defendant now muſt plead in *abatement*, that there are others who ought to be, and are not, joined with him; and he will not be allowed to give it in evidence, and nonſuit the plaintiff, *Rice* v. *Shute*, 5 *Bur.* 2613. 2 *Bl. Rep.* 696. The ſame was alſo decided in *Abbott* v. *Smith*, 2 *Bl. Rep.* 947., where this caſe is commented upon and denied.

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Pawns. Vide Poſt. 522.

2. Jones *verſus* Hart.

[Mich. 10 W. 3. *Coram* Holt, *C. J.* *At* niſi prius *at* Guildhall. 1 Ld. Raym. 738. S. C.]

Maſter liable for the neglect of his ſervant, not the wilful wrong. See prox. pag. ante 282. 2 Cro. 202. Palm. 514. 4 Leon. 123. 2 Saund. 345. 1 Mod. 198. Hob. 206. 3 Mod. 323. Hutt. 121. 3 Lev. 258. 1 Show. 29. Poſt. 613, 614. 5 Mod. 9, 340. 2 Saund. 260. Holt 642. S. C. 2 Lev. 172. Ante 18. 2 Str. 1004.

A Pawn-broker's ſervant took a pawn; the pawner came and tendered the money to the ſervant; he ſaid he had loſt the goods: Upon this the pawner brought trover againſt the maſter, and it was held well, *per Holt*, C. J.

The ſervants of *A.* with his cart run againſt another cart, wherein was a pipe of ſack, and overturned the cart, and ſpoiled the ſack; an action lies againſt *A.* So where a carter's ſervant run his cart over a boy, it was held the boy ſhould have his action againſt the maſter for the damage he ſuſtained by this negligence. So in *Lane* and *Cotton* (*b*), a letter with bills in it was delivered at the poſt-office to a ſervant; it was held, caſe lay againſt the poſt-maſter and not againſt the ſervant, unleſs he ſtole them, for then he was a wrong-doer, as where a gaoler ſuffers an eſcape wilfully; otherwiſe, if negligently. *Per Holt*, C. J.

(*b*) The contrary was ruled to what is here ſtated. *Vide* the caſe, pa. 17.

3. Domina Regina *verſus* Gouche.

[Mich. 1 Annæ, B. R. 2 Ld. Raym. 820. S. C.]

Order to pay 42 *s.*, being due for work and labour in huſbandry, though it do not appear ſuch wages as the ſtatute directs. Remedies

AN order was made by the juſtices on *Gouche*, reciting, That whereas 42 *s.* and 4 *d.* was due from him to *J. S.* for work and labour in huſbandry, they order him to pay the ſame: The exception was, that it does not appear to be ſtatute-wages, and ſuch only are within their juriſdiction. *Per Powell* and *Gould*. Though the ſtatute gives them a power only to ſet the rate for wages, and not to order

order payment; yet, grafting hereupon, they have alſo taken upon them to order payment; and the courts of law are indulgent in remedies for wages, as appears by its ſuffering the Admiralty to have cognizance of mariners' wages; and therefore they would intend it ſuch wages as were within the ſtatute: And *Gould*, J. cited a caſe, *The King* againſt *Dummer*, an order to pay for days-works and labour done, which was held well; for the Court will intend it within their juriſdiction upon general words, unleſs the contrary appear upon the face of the order, as in the caſe, 2 *Jones* 47. for a coachman's wages. Affirmed, *Holt abſente*.

for wages are favoured in the ſuperior courts. 5 Mod. 419. Poſt. pl. 5, 485. pl. 40.

Vi. Carth. 156, Str. 8. Forteſc. 318. Stat. 20 G. 2. c. 9.

4. Ward *verſus* Evans. [442]

[Hill. 2 Ann B. R. 2 Ld. Raym. 928. S. C. Comyns 138. S. C.]

WARD ſent his ſervant to receive a note of 50 *l.* of *B.*, who went with him to Sir *Stephen Evans*'s ſhop, who indorſed off 50 *l.* from a note *B.* had upon him, and gave *Ward*'s ſervant a note of 50 *l.* upon one *Wallis* a goldſmith, to whom the note was carried the next day by *Ward*'s ſervant: *Wallis* refuſed to pay, and that day broke; upon this the note was ſent back to Sir *Stephen Evans*, who refuſed payment, whereupon the action was brought. *Et per Cur.* it was held, 1ſt, That this was money received by Sir *Stephen Evans*. 2dly, That the act of a ſervant ſhall not bind the maſter, unleſs he acts by authority of his maſter; and therefore if a maſter ſends his ſervant to receive money, and the ſervant, inſtead of money, takes a bill, and the maſter, as ſoon as told thereof, diſagrees, he is not bound by this payment, but acquieſcence, or any ſmall matter, will be proof of the maſter's conſent, and that will make the act of the ſervant the act of the maſter.

Act of a ſervant binds not his maſter, unleſs he acts by authority of his maſter, or he conſents. See 2 Lev. 172. 3 Lev. 252. Comber. 451. 1 Salk. 132, 133. Winch. 24, 25. 5 Mod. 398, 399. 6 Mod. 36. S.C. 3 Salk. 118. Caſes B.R. 521. Holt 120. 1 Buliſt. 103. R. acc. 10 Mod. 109. Vide 1 Bl. Com. 429. 1 Str. 506. Eſp. 115. 3 Bac. Ab. 560. Fenn v. Harriſon, 3 T. R. 757. 4 T. R. 177.

3dly, They held this was no payment; for a goldſmith's note is only paper, and received conditionally, if paid; and not otherwiſe, without an expreſs agreement to be taken as caſh.

Goldſmiths' notes are payment conditionally only, without expreſs conſent. See 6 Mod. 36. Poſt 507, 508. 3 Mod. 86. 3 Lev. 299. Moll. li. 2. c. 10. Hob. 154.

4thly, They held, that the party receiving ſuch note ſhould have a reaſonable time to receive the money, as in this caſe, the next day, and is not obliged, as ſoon as he receives it, to go ſtraight for his money (*a*).

(*a*) *Vide Str.* 415, 416, 508, 533, 171. *Beawes* 461. *Kyd* 29, 80. 1175, 1248. *Bailey* 33, 73. 1 *T. R.*

5. Domina Regina *verſus* London.

[Trin. 3 Ann. B. R.]

In order for payment of ſervants wages, if it do not appear in what ſervice, the court will intend it huſbandry. Vide Poſt. 484. pl. 40. 5 Mod. 419. Ante, pl. 3, 441. 3 Salk. 261. S. C. 6 Mod. 2-4. Set. and Rem. 231. 3 T. R. 496.

ORDER was for payment of wages, reciting, That two perſons were retained by *London*, overſeer of the works in the gardens of *Hampton-Court*, at ſo much *per diem*, and had worked there ſo many days; therefore the order was, that *London* ſhould pay them. *Et per Cur.* The ſtatute extends only to ſervants in huſbandry, not to gentlemen's ſervants, nor to journeymen with their maſters. Had the order been general, *viz.* to pay ſo much to two of his labourers, *&c.*, or two of his ſervants, the Court ſhould have ſuppoſed them ſervants in huſbandry; but here is no room for ſuch an intendment, ſince the contrary appears.

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Vide 2 Lev. 69, 188, 228. 3 Lev. 37, 258, 351. S. C. 3 Lev. 320. 4 Mod. 58. 1 Show. 320. S. C. Carth. 216. Holt 465.

Merchants and Merchandize.

1. Jeffries *verſus* Legandra.

[Hill. 2 W. & M. B. R. Rot. 659.]

In policies warranted to depart with convoy, ſhall be intended without wilful default of the maſter. Vide ante 440. 6 Mod. 13. 4 Mod. 176. 1 Salk. 31. Molloy, lib. 2. *c.* 7. *ſ.* 12. 2 Keb. 717, 722.

ACTION on a policy of inſurance; the defendant pleaded *non aſſumpſit*, and the jury found the policy, by which the inſurers undertook againſt perils of ſea, pirates, enemies, *&c.*, from *London* to *Venice*, *warranted to depart with convoy*. *Et per Cur.* The words *warranted to depart with convoy* mean only, that he will leave the port, and ſail with the convoy, without any wilful default in the maſter; therefore if, by default of the maſter, the ſhip is ſeparated and taken, the inſurers are not liable; but if there be no default, the maſter having done all that could be done, and the ſhip is ſeparated and taken by enemies, the inſurers are liable; ſo if the ſhip be loſt by ſtreſs of weather, for they inſure againſt theſe by their own agreement (*a*).

(*a*) In the report of this caſe in 3 *Lev.* it is ſaid, that the words to *depart with convoy* extend to ſail with convoy for the whole voyage; and the ſame was ruled accordingly in *Lilly* v. *Ewer*, *Doug.* 74; though this caſe of accidental ſeparation was allowed to be no breach of the warranty. *Vide* alſo 2 *Str.* 1250. *Park.* 397.

2. Lethulier's *Caſe.*

[Mich. 4 W. & M. B. R.]

ACTION on a policy of inſurance by the defendant at *London*, inſuring a ſhip from thence to the *Eaſt Indies, warranted to depart with convoy;* and ſhews, that the ſhip went from *London* to the *Downs*, and from thence with convoy, and was loſt. After a frivolous plea and demurrer, the caſe ſtood upon the declaration; to which it was objected, that here was a departure without convoy. *Et per Cur.* The clauſe, *warranted to depart with convoy*, muſt be conſtrued according to the uſage among merchants, *i. e.* from ſuch place where convoys are to be had, as the *Downs*, &c. (*a*) *Holt*, C. J. *contra:* We take notice of the laws of merchants that are general, not of thoſe that are particular uſages. It is no part of the law of merchants to take convoy in the *Downs*. *Vide Yelv.* 136.

Warranted to depart with convoy, ſhall intend from the place of having convoy. 3 Lev. 320, 321. Molloy, l. 2. c. 7. ſ. 12. 4 Mod. 58. 2 Keb. 717, 722. 1 Show. 320. 2 Saund. 205. 2 Stra. 1205.

(*a*) *R. acc. Str.* 1265. Mr. *Park*, in his Treatiſe on Inſurances, 344, obſerves that this doctrine has been recognized in ſeveral other caſes, in which the queſtion has come collaterally before the Court, and that indeed of late years it has been tacitly acquieſced in; for there never is a convoy from the port of *London*.

3. Martin *verſus* Crump. [444]

[Paſ. 10 Will. 3. B. R. 1 Ld. Raym. 340. S. C.]

TWO joint merchants make *B.* their factor; one dies, leaving an executor; this executor and the ſurvivor cannot join, for the remedy ſurvives, but not the duty; and therefore on recovery he muſt be accountable to the executor for that. 116. Cro. Jac. 410. 1 Rol. Rep. 421. Com. Merchant D.

Survivorſhip. Vide 1 Show. 188, 189, &c. 2 Lev. 188. Comber. 474. S. C. 2 Saund.

4. Green *verſus* Young.

[Hill. 1 Ann. B. R. 2 Ld. Raym. 840. S. C.]

IF after a policy of inſurance a damage happens, and afterwards, in the ſame voyage, a deviation; yet the aſſured ſhall recover for what happened before the deviation; for the policy is diſcharged from the time of the deviation only.

Vide Shower 189. *Kemp* and *Andrews*: The remedy ſurvives between two joint merchants, but not the intereſt.

Deviation diſcharges policy from that time only. Vide acc. Str. 1249. Doug. 16, 346. Park. 349. et ſeq.

5. Anonymous.

[Hill. 1 Ann. B. R.]

Detention.

A Ship inſured was in her voyage ſeized by the government, and turned into a fireſhip: The queſtion was, Whether the inſurers were liable? *Holt*, C. J. thought it was within the word *detention*; but the cauſe was referred (*a*).

(*a*) This is part of the preceding caſe, *vide* 2 Ld. *Raym.* 840. The point, Whether inſurers are liable for damages from detention of ſhips by the government to which they belong? does not appear to have been judicially decided; but Mr. *Park* obſerves (pa. 91), that the very general words made uſe of in policies go to ſupport the idea entertained by Lord *Holt*; and though he has found no caſe where this point is *expreſsly ſettled*, yet it ſeems to have been *taken as* ſettled in many caſes which have come before before the Court; that in the caſe of *Robertſon* v. *Ewer*, 1 *T. R.* 61., no queſtion was made whether the inſurers were liable for loſs ſuſtained by ſuch a detention, provided it had happened to property ſpecifically inſured.

6. Bates *verſus* Grabham & al.

[Decemb. 3, 1703. *Coram* Holt, C. J. *At* niſi prius *at* Guildhall.]

Policy altered by conſent after it was writ ten, well. S. C. Holt 469.

IN *caſe* on a policy of inſurance, upon *non aſſumpſit* pleaded, the caſe was, Mr. *Criſp* being at the *Weſt Indies*, ſent a letter to *Bates* to inſure goods on the *Mary-Galley* of *St. Chriſtopher's*, Captain *A. Hill* commander, at *London*. *Bates* carried the letter to *Stubbs*, who writ policies, and he by miſtake made the aſſurance on the *Mary*, Captain *Haſlewood*, commander, &c. This policy thus made was ſubſcribed by the defendant. The *Mary-Galley* was loſt, and then *Stubbs* applied to the inſurers to conſent to alter the policy, to which they agreed, and the miſtake was mended. It was objected at the trial, that the *Mary* was a ſtouter ſhip than the *Mary-Galley*, and that the inſurers ought to have an increaſe of *premium* for the alteration. But it was held by *Holt*, C. J. that the action well lay, and that the miſtake might be ſet right, and that *Stubbs* was a good witneſs; and he cited this caſe, which happened when *Pemberton* was Chief Juſtice: An inſurance was made from *Archangel* to the *Downs*, and from the *Downs* to *Legharn*; but there was a parol agreement at the ſame time, that the policy ſhould not commence till the ſhip came to ſuch a place; and it was held the parol agreement ſhould avoid the writing.

Park. 3, 4. Motteux v. London Aſſurance Comp. 1 Atk. 545.

7. Bond *verſus* Gonſales.

[February 14, 1704. *Coram* Holt, *C. J.* *At* niſi prius *at* Guildhall.]

Deviation or not, muſt be conſtrued according to uſage. S. C. Holt 469. 2 Stra. 1265. 1 Bur. 348. Cowp. 602. 2 Str. 1165. Park. 308.

CASE upon a policy, which was to inſure the *William-Galley* in a voyage from *Bremen* to the port of *London*, *warranted to depart with convoy.* The caſe was, the galley ſet ſail from *Bremen*, under convoy of a *Dutch* man of war to the *Elb*, where they were joined with two other *Dutch* men of war, and ſeveral *Dutch* and *Engliſh* merchant ſhips; whence they ſailed to the *Texel*, where they found a ſquadron of *Engliſh* men of war and an admiral. After a ſtay of nine weeks they ſet out from the *Texel*, and the galley was ſeparated in a ſtorm, and taken by a *French* privateer, taken again by a *Dutch* privateer, and paid 80 *l.* ſalvage. And it was ruled *per Holt*, C. J. that the voyage ought to be according to uſage, and that their going to the *Elb*, though in fact out of the way, was no deviation; for till after the year 1703, there was no convoy for ſhips directly from *Bremen* to *London*: And the plaintiff had a verdict.

8. The Mayor and Commonalty of London *verſus* Wilks.

[Trin. 3 Annæ, B. R.]

Merchant, quid?

A Merchant includes all ſorts of traders as well and as properly as merchant adventurers. *Vide Spelm. Guilds*, *Dy.* 279. *b.* A merchant-tailor is a common term. *Per Holt*, C. J. (*a*)

(*a*) Ld. Ch. Baron *Comyns*, referring to this caſe, ſays, "Generally every one ſhall be a merchant who trafficks by way of buying and ſelling, or bartering of goods or any merchandize within the realm, or in foreign parts, *Dig. Merchant*, *A.* There are four ſpecies of merchants—merchant adventurers, merchants dormant, travellers, and merchants reſident, 2 *Brownl.* 99.

See 1 Salk. 25. 2 Keb. 463. Latch. 84. Yelv. 80. &c. infra.

Money.

Dixon *verſus* Willoughs.

[Mich. 8 Will. 3. B. R.]

Indebitatus aſſumpſit in 13 l. 10 s. for nine guineas, well. Latch 84. Yelv. 80, 125. Poph. 28. Cro. Car. 515. Palm. 427. 5 Mod. 6, 7. Lutw. 487, 488. 1 Salk. 9, 22, 25. S. C. Ante 311. 3 Salk. 239. Holt 471. Caſes B. R. 100. Comb. 327, 387. S. C. Vide Co. Lit. 207. a. but note 1. to Co. Lit. 207. b.

IN *caſe* upon four ſeveral promiſes, there was a verdict for the plaintiff, and entire damages. It was moved in arreſt of judgment, that one of the promiſes was ill laid, *viz.* That whereas the defendant was indebted to him in 13 *l.* 10 *s.* for nine guineas, he promiſed to pay, *&c.*, and ſays not, nine guineas *ad valorem*, *&c.*, as he ought, the value being not aſcertained by proclamation. *Et per Holt*, C. J.:

1ſt, Any piece of money coined at the Mint is of value as it bears a proportion to other current money, and that without proclamation. The unit was the old piece, which was 20 *s.* In King *James* the Firſt's time, the unit was by proclamation raiſed 16 *d.*, which was the reaſon and occaſion of the coin of guineas, and of their being 16 *d.* ſhort of the unit.

2dly, There are guineas of 40 *s.* a-piece, and ſo we will intend theſe were, and that the plaintiff was ſatisfied the reſt.

3dly, That it was not neceſſary to ſet forth the number of the guineas; for in an *indebitatus aſſumpſit* the conſideration is only ſet forth to ſhew it was not a debt by bond, *&c.*

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Vide 3 Mod. 131. 1 Mod. 18. Vaugh. 345, 346. 3 Lev. 351, 352. 2 Jon. 53, 54, 353, &c. 2 Brownl. 256. F. N. B. 222. S. C. Comb. 84. 1 Rol. Rep. 4. 3 Inſt. 181. 2 Inſt. 540. Holt 475.

Monopoly.

Edgeberry *and* Stephens.

3 Hawk. ch. 79. ſ. 14.

A Grant of a monopoly may be to the firſt inventor by the 21 *Jac.* 1.; and, if the invention be new in *England*, a patent may be granted, though the thing was practiſed beyond ſea before; for the ſtatute ſpeaks of new manufactures within this realm; ſo that if they be new here, it is within the ſtatute; for the act intended to encourage new devices uſeful to the kingdom, and whether learned by travel or by ſtudy, it is the ſame thing. Agreed by *Holt* and *Pollexfen*, in the caſe of *Edgeberry* and *Stephens*.

Monſtrans de droit, &c.

Vide 5 Mod. 57, 58. Ryley Plac. Parl. 257, 352. Staundf. P. C. 72.

Domina Regina *verſus* Maſon.

[Trin. 1 Ann. B. R.]

IT was found by inquiſition, that *Ford* had forfeited his office of warden of the *Fleet*, upon which it was ſeized into the queen's hands. One *Maſon* brought a *monſtrans de droit* in Chancery on the inquiſition, and ſets forth a title, and traverſes *Ford*'s being ſeized of the office, ſo that by conſequence he could not forfeit it; the attorney-general demurred. The cauſe was brought into *B. R. per proprias manus* of the Lord Chancellor; and now it appeared that *Maſon*'s title, as ſet forth, was naught; whereupon *Maſon*, as *amicus Curiæ*, inſiſted ſtill that *Ford* had not forfeited, and ſo the queen had no title; and therefore it was urged, that no judgment could be given for the queen, and that the whole record was here, and the record being here, the whole record was to be affirmed or ſubverted by the judgment of this Court. *Et per Cur.* The very record of the inquiſition itſelf is not before us, but only the record of the *monſtrans de droit*: For, as to the inquiſition, the *monſtrans de droit* recites it, and concludes *prout patet per record. inquiſitionis in filaciis Curiæ Cancellariæ*; and the *monſtrans de droit* may ſet forth the inquiſition, with an *inter alia*, and *oyer* may be craved of it. 2dly, The Court held, that though the very record of the inquiſition was not ſo before the Court, as that they could quaſh or ſubvert it, with reſpect to all perſons or parties; ſo as no other perſon could at any time after come into Chancery and ſhew his right, for that would be inconvenient; yet it was here with reſpect to the party plaintiff in this *monſtrans de droit*, ſo that if thereby a title appeared for him, the Court might give judgment; and if the inquiſition be falſified, it ſhall be ſet aſide, ſo far as to make way for the party's right; and if the party's right can be collected from the inquiſition, it ſhall be affirmed by the judgment; ſo was *Holland*'s caſe, and ſo is *Kel.* 93. 3dly, They held, that if it appears that he that ſued the *monſtrans de droit* has no right, he cannot mend his caſe by exceptions to the inquiſition taken as *amicus Curiæ*, though by thoſe exceptions it appears the queen has no right, or that a ſtranger has right; for the party that ſues a *monſtrans*

If the plaintiff fails in his title, he cannot take advantage of want of title in the crown, or of a ſtranger's title. S. C. Far. 32.

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Vide Fareſ. 32.

The record of the inquiſition is only before the Court, with reſpect to the plaintiff; but not in reſpect to other perſons and parties.

Vide 1 Salk. 395. 5 Mod. 57.

ſtrans de droit is a plaintiff, and may be nonſuit. 4 *H.* 6. 12. And, if he fails in his own title, he is gone as effectually as if he were nonſuit, and no judgment needs to be given for the queen; accordingly judgment was given here, *quod nil capiat per billam ſuam de monſtratione ſua prad.*

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Vide 1 Chan. Caſ. 2, 22, 59, 102, 166, 285. 2 Chan. Caſ. 23, 29, 52, 97, 221, 206.

Mortgages.

1. Lord Oſſulſton *contra* Lord Yarmouth.

[Decem. 1707. In Canc.]

Proviſo, That future intereſt, if not paid, ſhall be taken as principal, and bear intereſt, is void. 2 Chan. Caſ. 226, 51, 258. 2 Chan. Caſ. 35, 59. Vide 2 Atk. 330. Treatiſe of Equity 119.

THE Earl of *Yarmouth* made a mortgage to my Lord *Oſſulſton*, with a *proviſo*, that if the intereſt was behind ſix months, that then that intereſt ſhould be accounted principal, and carry intereſt. *Et per Cowper*, Lord Chancellor, this clauſe was decreed to be vain, and of no uſe, ſaying, No precedent had ever carried the advance of intereſt ſo far, and that an agreement made at the time of the mortgage will not be ſufficient to make future intereſt principal; but, to make intereſt principal, it is requiſite that intereſt be firſt grown due, and then an agreement concerning it may make it principal.

2. Taylor *contra* Wheeler.

[Mich. 8 Ann. In Canc.]

Mortgagee or purchaſor precedent, though by defective conveyance, ſhall be preferred before aſſignees of commiſſioners of bankrupt. See 1 Chan. Caſes 119, 150, 166, 167, 201, &c. S. C. Eq. Ab.

A Copyholder in fee ſurrendered to the uſe of the mortgagee in fee, and became bankrupt before preſentment, and there never was any preſentment made; and the queſtion was, Whether the aſſignee of the commiſſioners of bankruptcy, or the mortgagee, ſhould be preferred? *Et per Cowper*, Lord Chancellor, Though the ſurrender was void in law for want of a preſentment, and that might be the laches of the mortgagee in not procuring it; yet the ſurrender has a lien, and bound the land in equity (*a*), and the aſſignee ought not to be in a better caſe

(*a*) As to the relation of the admittance to the ſurrender at law in *Roe* v. *Griffith*, 4 *Bur.* 1952. *Benſon* v. *Scott*, *ante* 185, and the authorities therein referred to.

caſe than the bankrupt, who was plainly bound in equity by this defective conveyance. *Et come moy ſemble*, he became a truſtee for the purchaſer [*mortgagee*] (*a*).

122. p. 3. 312, p. 8. 2 Vern. 564. Vern. 267.

(*a*) The creditors and aſſignees of a bankrupt ſtand in his place, and are ſubject to the ſame equity, and bound by all acts fairly done by him; for, although the Court will favour creditors as much as they can, it muſt be where they have a ſuperior right to other perſons, *Co. Bank. L.* 325. *Vide Tyrrell* v. *Hope*, 2 *Atk.* 558. *Pye* v. *Daubuz*, 3 *Bro.* 595. *Finch* v. Lord *Winchelſea*, 1 *P. Wms.* 277. *Jacobſon* v. *Williams*, *id.* 382. *Boſvil* v. *Brander*, *id.* 458. *Buſhnan* v. *Pell*, *Cox*'s note, *ibid.* *Ruſſel* v. *Ruſſell*, 1 *Bro.* 269.

3. Cope *contra* Cope.

[In Canc.]

Where perſonal eſtate ſhall be applied to pay off mortgage in exoneration of land. S. C. Eq. Ab. 269. p. 2. Hardr. 512.

IF a man mortgage lands, and covenants to pay the money, and dies, the perſonal eſtate of the mortgagor ſhall, in favour of the heir, be applied to exonerate the mortgage: So it is, though there was no covenant, if the mortgagor had the money; * becauſe it was his debt, and he is bound to make it good though the land be a defective ſecurity; but if grandfather mortgages and covenants to pay, and the lands deſcend to his ſon, and his ſon dies, having a perſonal eſtate and a ſon, the ſon's perſonal eſtate ſhall not go in aid of this mortgage. *A.* mortgages his land to *B.*, and after ſells it to *C.* for 1000 *l.*, which includes the mortgage money; *C.* the purchaſer ſhall pay the mortgage, for he has made it a debt in himſelf: But it is to be underſtood that this exoneration is not to be allowed, unleſs there be perſonal aſſets ſufficient to pay all legacies; for the mortgage ſhall be paid out of the land if there be not perſonal aſſets to pay the legacies; and if by ſuch payment aſſets fall ſhort, the legatees may make ſuch mortgagee refund (*b*).

* [450]

1 Chan. Caſ. 81, 223, 271, 285, 286. 1 Chan. Rep. 98, 148, 183, 191. 2 Chan. Caſ. 98, 165, 187, 221. 2 Chan. Rep. 274, 396. 3 Chan. Rep. 212, 213. Vern. 36, 37.

(*b*) The doctrine upon this ſubject is collected in the following note, by Mr. *Cox*, to the caſe of *Howell* v. *Price*, 1 *P. Wms.* 290. "The perſonal eſtate of a teſtator ſhall in all caſes be primarily applied to the diſcharge of his perſonal debt (or general legacy), unleſs he, by expreſs words, or manifeſt intention, exempt it, 2 *Atk.* 625. 3 *Atk.* 202. *Haſlewood* v. *Pope*, 3 *P. Wms.* 324. *French* v. *Chicheſter*, 1 *Bro. P. C.* 192. *Fereyes* v. *Robertſon*, *Bunb.* 302. *Walker* v. *Jackſon*, 2 *Atk.* 624. *Bridgeman* v. *Dove*, 3 *Atk.* 202. Earl of *Inchiquin* v. *French*, *Ambler* 33., and 1 *Wilſ.* 82. *Samwell* v. *Wake*, 1 *Bro. Chan. Rep.* 144. Duke of *Ancaſter* v. *Mayer*, 1 *Bro. Chan. Rep.* 454. Yet it may be exempted, as in *Bampfield* v. *Wyndham*, *Prec. Chan.* 101. *Wainwright* v. *Bendlowes*, 2 *Vern.* 718., and *Ambler* 581. *Stapleton* v. *Colville*, *Caſ. Temp. Talb.* 202. *Walker* v. *Jackſon*, 2 *Atk.* 624. *Anderton* v. *Cooke*, and *Kynaſton* v. *Kynaſton*, (cited) 1 *Bro. Ch. Rep.* 456. *Holiday* v. *Bowman*, cited 1 *Bro. Ch. Rep.* 145. *Webb* v. *Jones*, 2 *Bro. Ch. Rep.* 60. Every loan creates a debt from the borrower, whether there be a bond or covenant for payment

payment or not, *Cope* v. *Cope*, *ſupra*. *Howell* v. *Price*, 1 *P. Wms. ubi ſupra*. *Baſh* v. *Hyam*, 2 *P. Wms.* 455. *King* v. *King*, 3 *P. Wms.* 358. So it ſhall be, although ſuch perſonal debt be alſo ſecured by mortgage, as in the ſaid caſes of *Howell* and *Price*, *Cope* v. *Cope*, and in *Pockley* v. *Pockley*, 1 *Vern.* 36. *King* v. *King*, 3 *P. Wms.* 360. *Gatton* v. *Hancock*, 2 *Atk.* 436. *Robinſon* v. *Gee*, 1 *Ves.* 251. Earl of *Belvidere* v. *Rockſort*, 6 *Bro. P. C.* 520. *Philips* v. *Philips*, 2 *Bro. Ch. Rep.* 273. So lands ſubject to or deviſed for payment of debts, ſhall be liable to diſcharge ſuch mortgaged lands either deſcended or deviſed, *Bartholomew* v. *May*, 1 *Atk.* 487. Marchioneſs of *Tweedale* v. Earl of *Coventry*, 1 *Bro. Ch. Rep.* 240.; even though the mortgaged lands be deviſed expreſsly ſubject to the incumbrance, *Serle* v. *St. Eloy*, 2 *P. Wms.* 386. So lands deſcended ſhall exonerate mortgaged lands deviſed, *Galton* v. *Hancock*, 2 *Atk.* 424. So unincumbered lands and mortgaged lands, both being ſpecifically deviſed (but expreſsly after payment of all debts) ſhall contribute in diſcharge of ſuch mortgage, *Carter* v. *Barnardiſton*, 1 *P. Wms.* 505. and 2 *Bro. P. C.* 1. But in all theſe caſes, the debt being conſidered as the *perſonal* debt of the teſtator himſelf, the charge on the real eſtate is merely collateral. The rule, therefore, is otherwiſe where the charge is on the real eſtate principally, although there be a collateral perſonal ſecurity; Counteſs of *Coventry* v. Earl of *Coventry*, 2 *P. Wms.* 222. *Edwards* v. *Freeman*, 2 *P. Wms.* 437. *Wilſon* v. Earl of *Darlington*, 2 *P. Wms.* 664. note; *Ward* v. *Ld. Dudley*, 2 *Bro. Ch. Rep.* 316.; or where the debt (although perſonal in its creation), was contracted originally by another, *Cope* v. *Cope*, *ſupra*. *Bagot* v. *Oughton*, 1 *P. Wms.* 347. *Leman* v. *Newenham*, 1 *Ves.* 51. *Robinſon* v. *Gee*, 1 *Ves.* 251. *Parſons* v. *Freeman*, *Ambler* 115. *Lacam* v. *Mertins*, 1 *Ves.* 312. *Perkins* v. *Bayntun*, 2 *P. Wms.* 664. note; *Lawſon* v. *Hudſon*, 1 *Bro. Ch. Rep.* 58. *Shaſto* v. *Shaſto*, 2 *P. Wms.* 664. note; *Baſſett* v. *Percival*, *ibid.* Earl of *Tankerville* v. *Fawcett*, 2 *Bro. Chan. Rep.* 57. *Tweddell* v. *Tweddell*, 2 *Bro. Chan. Rep.* 101, 152. *Billingburſt* v. *Walker*, 2 *Bro. Ch. Rep.* 604. With reſpect to the priority of application of real aſſets (when the perſonal is either exempt or exhauſted), it ſeems, 1ſt, That the real eſtate, expreſsly deviſed for payment of debts, ſhall be applied. 2dly, (To the extent of the ſpecialty debts), the real eſtate deſcended. 3dly, The real eſtate ſpecifically deviſed, ſubject to a general charge of debts. *Galton* v. *Hancock*, 2 *Atk.* 424. *Powis* v. *Corbett*, 3 *Atk.* 566. *Wride* v. *Clarke*, 2 *Bro. Ch. Rep.* 261, note. *Davies* v. *Top*, 2 *Bro. Ch. Rep.* 259, note. *Denne* v. *Lewis*, 2 *Bro. Ch. Rep.* 257. As to marſhalling aſſets, *vide* note to *Cliſton* v. *Burt*, 1 *P. Wms.* 678. inſerted 2 *Salk.* 416. *Vide* alſo *Cox*'s note to 2 *P. Wms.* 664.

Vide Records 565. Rules, &c. 597. pag. 598. pl. 3. & 647. pl. 14.
Vide poſt. 671.

Motion.

1. Hinton *verſus* Hern.

[Hill. 9 Will. 3. B. R.]

Franchiſe cannot be allowed on motion, unleſs it has been for-

IN a motion for prohibition to the univerſity of *Cambridge*, the other ſide inſiſted on their privileges, which are confirmed by parliament. *Et per Cur.* You muſt plead

plead them. The difference is, where franchiſes have been once allowed on plea, and are upon record in court, there they may be allowed upon motion ever after; but, where they have not been allowed, it is otherwiſe; and ſo it was held and done between *Caſtle* and *Litchfield*, where the franchiſe of *Oxford* was pleaded; and ſo they were obliged to do here.

merly pleaded and allowed, and is upon record. Vide 1 Salk. 343. & poſt. 500. S. C. Caſes B. R. 165. 2 Wilſon 406, &c.

2. Domina Regina *verſus* Layton.

[Paſch. 4 Ann. B. R.]

UPON a conviction of forcible entry, if a fine be ſet, the conviction cannot be quaſhed upon motion, but the defendant muſt bring his writ of error; otherwiſe if no fine be ſet, for then it may be quaſhed upon motion: *Per Cur.* 1 Stra. 474.

Where fine is ſet for forcible entry, conviction, not quaſhed on motion. Ante 106, 153. 2 Stra. 794.

Names of Purchaſe and Dignity.

Hob. 129. 1 Vent. 152. Lit. R. 181, 201. Yelv. 34. 1 Sid. 40. 1 Lev. 50. 1 Show. 392. 5 Mod. 303. Ow. 81. Pop. 209. Noy 88. 4 Co. 218. 6. Co. 53. 1 Salk. 6, 50. 1 Ld. Raym. 303, 304, 562.

AN *indictment* was preferred againſt two chairmen for a battery upon *Thomas* Lord Marquis of *Carmarthen*, who was called up to the Houſe of Lords by the name of Lord *Oſborn*; and it was held by the Chief Juſtice, that there was no ſuch perſon, or at leaſt the Duke of *Leeds* was the perſon, and not the proſecutor. At the *Old Baily*, one was indicted for ſtealing the goods of the Earl of *Kingſton*, who was the eldeſt ſon of the Marquis of *Dorcheſter*, and the defendant was acquitted by the opinion of all the judges, for he was only Mr. *Pierpoint*. In the Houſe of Lords, complaint was made againſt the Marquis of *Carmarthen*, for breach of privilege, and the Houſe ſaid there was no ſuch perſon. The defendants were acquitted.

Indictment for aſſaulting a duke's eldeſt ſon, ſtyling him by his father's ſecond title according to common parlance, ill. Poſt. 500, 539, 512. Parliament Caſes 2, 3, &c. 6 Mod. 303. Carth. 297. Comb. 273. Fareſt. 15, 28, 38.

2. The Preſident and College of Phyſicians, London, *verſus* Salmon.

S. C. 5 Mod. 327, 328. 4 Mod. 47.

[Trin. 13 Will. 3. B. R. 1 Ld. Raym. 680. S. C.]

DEBT was brought in the name of the Preſident and College of Phyſicians, on the ſtat. 14 *H.* 8. *c.* 15., for the penalty of 5 *l. per* month for practiſing phyſic in *Lon-*

Corporation may ſue by their name of incorporation, notwithſtanding

an expreſs power given to ſue by another. See Lutw 510, &c. 563. Cro. El. 357. Hard. 501. Hob. 210. Vid. 6 Mod. 44. 2 Buſt. 185. R. acc. 1 Ld. Raym. 153.

don without licence; and, upon demurrer to the declaration, this exception among others was taken, that the action ought to be brought in the name of the College only, or the Preſident only; the words of the patent being, *quod ipſi per nomina preſidentis collegii, ſeu communitatis facultatis medicinæ, London*, ſhall ſue and be ſued. To this it was anſwered, that they are incorporated by the name of Preſident and College, and have in conſequence of that a power to ſue and be ſued by that name; and this power is not taken away by the additional affirmative power which is farther given to them. 10 *Co.* 28. *b.* 30, 123. 1 *Ro. Ab.* 513. *Fitz. Brief*, 485. 5 *E.* 4, 20. 16 *H.* 7. 1. 20 *H.* 6. 4. 44 *E.* 3 6. *b.* 11 *H.* 7. 27. 13 *H.* 7. 14. And judgment was given for the plaintiff.

[452] 3. Domina Regina *verſus* The Inhabitants of Barking, Needham Market, and Darmeſden Hamlets.

[Paſch. 5 Ann. B. R.]

On a certiorari to remove orders, the name of the pariſh in the writ, and that in the order, muſt appear to be the ſame. Vide ante 434. pl. 16. 1 Salk. 145, 146, 151. March 112. 1 Lev. 50. 1 Buſt. 159. 1 Keb. 165. Far. 97. Poſt. 472.

A *Certiorari* iſſued to remove all orders concerning the inhabitants of the pariſh of *Barking*, *Needham Market*, and *Darmeſden* hamlets, and the orders mentioned *Barking*, and *Needham*, and *Darmeſden* hamlets, without *Market*. Serjeant *Weld* argued, that they muſt be taken to be the ſame. 1 *Sid.* 64. Writ was to the Juſtice of *Cheſter*; return was by the Chief Juſtice; and 1 *Ro.* 334. A ward and a liberty of a city is the ſame: *Holt*, C. J. The Chief Juſtice of *Cheſter* in his patent is called *juſticiarius*, and there was but one till 18 *Eliz. c.* 8., which gave the queen power to make another, who is ſtyled *alter juſticiarius*, and the firſt *juſticiar*, and ſo our writs are directed; we therefore take notice of him, and do not regard his calling himſelf Chief Juſtice. The reaſon of 1 *Ro.* 334. is, (*a*) *that a ward of a city is no venue*, therefore the *venue* is from the city. A jury may come from a *lieu conus* out of a city, not from a *lieu conus* within a city. If *Needham* and *Needham Market* be the ſame hamlet, ſo it ſhould have been returned; but we cannot take notice that there is no ſuch hamlet as *Needham Market*. If treſpaſs *quare clauſum fregit* at *Needham* were brought, and the plaintiff proved a breaking at *Needham Market*, he muſt be nonſuit.

( ) *Sid.* 326. 2 *Cro.* 222. *contr.*

Novel Aſſignment.

Vide 1 Mod. 89. and Syſtem of Pleading, tit. Novel Aſſignment and Doct. Placit. 379, 380.

1. Coke *verſus* Evans.

[Trin. 2 Ann. B. R.]

TRESPASS for taking the cattle in *D.* The defendant pleaded, that the *locus in quo* was twenty acres, *&c.*, where he had common, and juſtifies for damage-feaſant; the plaintiff replied, that he took them in ſuch a place, [*viz.* another.] And it was agreed *per Holt*, C. J. and *Powell*, that the plaintiff might have a new aſſignment, which they told Mr. *Southouſe*, *ſubridendo*; who neither confeſſed nor avoided his bar, but gave it the go-by.

Where defendant by plea makes a tranſitory treſpaſs local, the plaintiff may make a new aſſignment. Hob. 16. 2 Cro. 141. Carth. 176.

2. Helvis *verſus* Lamb.

[Hill. 2 Ann. B. R.]

TRESPASS for taking and carrying away his goods in *D.* The defendant pleaded, that the *locus in quo* was his freehold, and that he took the goods damage-feaſant, *&c.* The plaintiff demurred generally, and had judgment; for the action being tranſitory, there is no *locus in quo* ſuppoſed: Otherwiſe in treſpaſs *quare clauſum fregit in* D., the *clauſum* is a *locus in quo*; but in the principal caſe there is no place in particular ſuppoſed, only *D.* is alleged for a *venue*; therefore if the defendant will make the place material, it muſt come on his part to ſhew a place certain: Alſo in treſpaſs *quare clauſum fregit in* D., if the defendant plead *liberum tenementum*, and iſſue be joined thereupon, it is ſufficient for the defendant to ſhew any cloſe that is his freehold; but if the plaintiff gives the cloſe a name, he muſt prove a freehold in the cloſe named: So adjudged in *C. B.*, and the judgment affirmed in *B. R.* upon a writ of error.

Where the place is made material by the defendant's plea, he muſt ſhew it with certainty. S. C. 6 Mod. 117, 119. Carth. 176. Com. Pleader 3 M. 24. vol 5. 3d edit. pa. 804. Hob. 16, 176. 3 Cro. 812, 897. Poph. 139. Tri. p. Pais 378. 2 Cro. 594. Dy. 23, 147. Yelv. 167.

Niſi prius.

3. Bullock *verſus* Parſons.

[Paſ. 4 Ann. B. R. 2 Ld. Raym. 1143. S. C.]

Diſtringas with a blank for the cauſe of action, amendable. S. C. Holt 496. Authority of a Judge of niſi prius is by commiſſion of aſſize. Vide poſt. 456. Raym. 38, 73. 2 Inſt. 424.

IN *debt*; after verdict for the plaintiff, Mr. *Eyre* moved in arreſt of judgment, that the *diſtringas* was with a blank, and *debiti* (the cauſe of action) omitted; ſo it was a *diſtringas* in another cauſe. On the other ſide it was urged to be as no *diſtringas*, and aided by verdict; and that it was amendable. *Hob.* 246. 2 *Cro.* 528. The Court made two queſtions, 1ſt, Whether the judge of *niſi prius* had authority to try this iſſue? *Et per Holt*, C. J. The authority of the judge of *niſi prius* is not by the *diſtringas*, but by the commiſſion of aſſize; for it is the 13 *E.* 1. *c.* 30. which gives the trial by *niſi prius*, and by that ſtatute the trial by *niſi prius* is given before juſtices of aſſize; and at firſt theſe trials by *niſi prius* were always had and made upon the *venire facias*, and indeed the clauſe of the *niſi prius* is, by the 13 *E.* 1. *c.* 30., expreſsly ordered to be inſerted in the *venire facias*; and trials by *niſi prius* continued to be upon the *venire facias* till 42 *E.* 3. *c.* 11., which requires that the names of the jurors be firſt returned into court. By this act two inconveniences were remedied. 1ſt, The party might now be prepared to make his challenges, the pannel being firſt returned into court, which was not before; and, 2dly, The defendant was prevented by this means to caſt an eſſoin at *niſi prius*, which was uſed frequently before; for, by *Marlb. c.* 13., the defendant was allowed one eſſoin, and that after iſſue joined upon the return of the *venire*: By conſequence, when that was returned at *niſi prius*, he could eſſoin at *niſi prius*; but now it is returned above, he muſt eſſoin above, and cannot now eſſoin at the trial, becauſe the trial is upon the *diſtringas*, and not upon the *venire*. 3dly. The Court held no *diſtringas*, or the want of a *diſtringas*, to be aided by verdict, but an ill *diſtringas* was not; and remembered a caſe, wherein *Saunders*, of counſel at the bar, dropped the *diſtringas* out of his hand, that he might want a *diſtringas*, which would be aided, and not keep and ſhew an ill one, which would be naught. Alſo they held it amendable, and gave judgment *pro quer.*

2 Inſt. 126, 127.

Want of a diſtringas is aided by verdict, ill diſtringas not. Danv. 1 part 357. Tri. p. pais 57. Hob. 246. 3 Cro. 622, 258.

Nonſuit, &c.

1 Sal. 21.
6 Mod. 95, 261.
Hard. 126, 153.
Raym. 38, 73.
Fareſl. 32, 48, 86.

1. Allington *verſus* Vavaſor.

[Trin. 12 Will. 3. B. R.]

A *Latitat* was ſued out againſt four defendants in treſpaſs; the plaintiff was nonſuit for want of a declaration, and the defendant's attorney entered four nonſuits againſt him; and it was held to be irregular, becauſe the treſpaſs is joint, and though the plaintiff may count ſeverally againſt the defendants, yet it remains joint till it is ſevered by the count (*a*).

In treſpaſs againſt four, there can be but one nonſuit for want of declaring.

(*a*) *R. ſimiliter* on a judgment of *non proſ.* 4 *Bur.* 2418.

2. Lover *verſus* Salkeld.

[Trin. 12 Will. 3. B. R.]

TRESPASS againſt two defendants, and verdict for the plaintiff; one defendant being an infant, the plaintiff took judgment againſt the other, and entered a *non proſ.* after the judgment againſt the infant. Upon this judgment the plaintiff ſued out execution, upon which error was brought: And Mr. *Northey* objected, that the execution and judgment could not vary from the demand of the writ: *Raymond contra.* Torts are ſeveral, and the plaintiff may as well enter a *non proſ. quoad* one defendant upon a trial by verdict, as if one defendant had demurred, and verdict againſt the other; and that a *non. proſ.* may be entered after judgment as well as before; and for *non proſ.* entered after judgment, he cited 15 *E.* 4, 26. 14 *E.* 4. 6. *Hob.* 71. 1 *Ro. Rep.* 379. 2 *Ro. Abr.* 100. *pl.* 5. *Holt*, C. J. ſaid, he ſuppoſed thoſe were interlocutory judgments wherein it might well be, but a final judgment differed; for that being once wrong, a ſubſequent entry would not ſet it right. *Adjournatur.*

Non proſ. may be entered as to one defendant after interlocutory judgment, not after final. Vide 1 Cro. Hager verſ. Wood. Co. Entr. 630. b. & 676. b. Raſt. Entr. 582. b. Hob. 70, 108. 11 Co. 50. b. 3 Cro. 762. Vide Doug. 163. (161.)

S. C. Fareſl. 32.

3. Cooke *verſus* Foſter.

[Trin. 1 Ann. B. R.]

Where the defendant files bail without arreſt, plaintiff may be non-proſſed Carth. 172.

IF a man appear at the day of the return of the proceſs and put in bail, though he never was arreſted, nor the proceſs returned; yet if the plaintiff does not declare againſt him in two terms, a *non proſ.* may be entered againſt him.

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S. C. 1 Salk. 21. 6 Mod. 261.

4. Goddard *verſus* Smith.

[Mich. 3 Ann. B. R.]

Vide 11 Co. 65, 66. 6 Mod. 95, 262. 1 Sid. 420. 1 Vent. 32. 5 Mod. 208. Hard. 126, 153. Comber. 18.

A Diſcharge by *nolle proſequi* upon an indictment, is not ſufficient to maintain an action for a malicious proſecution. *Vide this caſe*, title *Action ſur le Caſe*, *pl.* 11. *p.* 21.

Entries of non proſ. 6 Mod. 25, 216. 8 Co. 58, 2 Keb. 521. 5 Mod. 394. Hard. 126, 153. 1 Rol. Abr. 786. pl. 2.

Vide Co. Ent. 650. *d.* In treſpaſs, ſeveral iſſues, one found for the plaintiff, *& ſuper hoc idem quer. gratis hic in Cur. cognovit ſe ulterius nolle proſequi verſus le defend. de cæteris exitibus*, upon which here is an *eat inde ſine die*, and the plaintiff has judgment for the other; *et vide ibi* 676. *&c.*, iſſue for part, and demurrer for part, in an action of treſpaſs, and verdict *pro quer.* upon the iſſue; upon which the plaintiff enters a *non proſ.* in this manner: *Et ſuper hoc idem quer. quoad materiam prædict. unde partes prædict. poſuerunt ſe in judicium fatetur ſe nolle materiam illam, &c., ulterius quoviſmodo intromittere: Ideo idem defendens eat inde ſine die, &c., & ſuperinde idem querens petit judicium de dampnis prædict. &c. Ideo conſideratum eſt*, that the plaintiff recover; and that the plaintiff be amerced *pro falſo clamore* as to the reſt, *& quod defendens eat inde ſine die. Vide ibi* 28. Jury came in with their verdict, and the plaintiff was nonſuit, and the entry is, *ſuper quo querens ſolemniter exactus non revenit, nec eſt proſecutus billam ſuam, ſuper quo conſideratum eſt quod nil capiat.*

6. Greeves *verſus* Rolls.

[Paſch. 4 Ann. B. R.]

Judge of niſi prius may receive a non proſ. at the aſſizes. Vide ante 454. Raym. 38, 73. 12 Ed. 2. c. 4.

THE judge of *niſi prius* may receive a *non proſ.* at the aſſizes; ſo it was held by two judges, and that judgment was affirmed in the Houſe of Lords againſt the opinion of *Holt*, C. J. For before the ſtatute of *York*, the juſtices of *niſi prius* had no power to record a nonſuit or default in the country, and conſequently have no power now to

to enter a *non prof.*, which is not within that ſtatute. At common law they could not record a *non prof.*, default or nonſuit. *Nota;* The principal caſe was, ejectment againſt ſeveral, who all entered into the rule of leaſe, entry, and ouſter; at the aſſizes ſome would confeſs, and others would not: The plaintiff, as to thoſe who would not confeſs, entered a *non prof.*, and went on againſt the others, and recovered; upon this a rule was made, that in like caſes the plaintiff ſhould go on againſt thoſe who would confeſs, and as to thoſe who would not, ſhould be nonſuit; but that the cauſe of the nonſuit ſhould be expreſſed in the record, *viz.* becauſe thoſe defendants would not confeſs leaſe, entry, and ouſter; and upon the return of the *poſtea*, the Court would be informed what lands were in the poſſeſſion of thoſe defendants, that the judgment might be entered againſt the caſual ejector as to them (*a*).

In ejectment againſt ſeveral, if ſome confeſs leaſe, &c. and others do not, the plaintiff may go on as to the former, and be nonſuit as to the latter.

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It was agreed in the arguing of this cauſe, that where there are ſeveral defendants, and they ſever in plea, whereupon iſſue is joined, that the plaintiff may enter a *non prof.* as to one defendant at any time before the record is ſent down to be tried at *niſi prius*.

Where ſeveral defendants ſever in plea, plaintiff may enter non prof. againſt one, any time before record ſent down.

2 Rol. Abr. 100. Hob. 70.

(*a*) This caſe is reported in 12 *Mod.* 651. as of *Hil.* 13 *W.* It appears that the caſe was, that the plaintiff entered a *retraxit* at *niſi prius* as to one defendant, which the Court held to be irregular; and it was laid down, that where there are ſeveral defendants, and one refuſes to confeſs, *&c.* he ſhould be *acquitted*, [*not* that the plaintiff ſhould be *nonſuit* as to him;] and thereupon judgment ſhould be given againſt the caſual ejector. And, as in 1 *Bur.* 359. the report in *Salkeld* is ſtated to be wrong, the caſe was probably as reported in 12 *Mod.* *Vide* alſo the reports of this caſe, 1 Ld. *Raym.* 716. *Comyns* 113.

If the plaintiff obtains judgment by default againſt one defendant, he cannot be nonſuit as to another, *Weller* v. *Gayton*, 1 *Bur.* 358. *Harris* v. *Butterley*, *Cowp.* 485. *Hannay* v. *Smith*, 3 *T. R.* 662.

Notice, &c.

Vide 5 Mod. 96, 129, 257, 330, 442, &c. 2 Show. 316. 2 Lev 21, 106, 152. Lutw. 404, 409, &c. S. C. Poſt. 650.

1. Lazier *verſus* Dyer.

[Mich. 2 Ann. B. R.]

ISSUE being joined and entered, as of *Trinity* term, the plaintiff reſted till the *Trinity* term following, and then gave notice of trial after the term; and a *venire facias*

If there be no proceeding in fact within four terms, there

must be a term's notice of trial. Vide poſt. 645. 1 Mod. 1. 6 Mod. 18, 146. 6 Mod. 57. S. C. called Leraild verſ. Dyer. 1 Keb. 112. 1 Sid. 34, 231. 2 Lilly 151, 356. 2 Bl. Rep. 784. Doug. 71. Str. 531, 1164.

and *diſtringas* was taken out in the vacation, but teſted and entered as of the term. *Et per Cur.* This is not ſufficient notice; for though in law, this was a proceeding within the term, yet in fact it was a proceeding in vacation, and therefore there was not a term's notice of trial.

2. Smith *verſus* Goff.

[Paſ. 4 Ann. B. R. 2 Ld. Raym. 1126. S. C.]

Notice not neceſſary to be alleged, where the thing can be intended to be known without it. See 6 Mod. 182, 200, 259, 288. 4 Mod. 230, 239. 5 Mod. 330. Far. ſt. 143, &c. 5 Com. Dig. tit. Pleader, c. 61. pa. 362. c. 75. pa. 367. 3d edit.

PLAINTIFF declares, That whereas *H.* owed him 30 *l.* by bond, the defendant promiſed, that, if the plaintiff delivered up the ſaid bond, he would pay him the ſaid 30 *l.*, and ſays, he delivered up the ſaid bond to *H.*, *unde* the defendant had notice, and had not paid it. On *non aſſumpſit* pleaded, verdict was for the plaintiff. Upon motion in arreſt it was held, 1ſt, That delivery muſt be intended to the obligor, for that is properly a delivering up; and delivering up muſt be conſtrued the moſt effectual delivering; which is ſuch as that the bond may be cancelled. 2dly, There needs no *notice*, becauſe the defendant knew whom to reſort to; and the difference is, where a perſon is named, and where not.

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Vide 9 Co. 57, &c. 5 Mod. 2, 12. Raym. 71. 6 Mod. 145. Vaugh. 333, 340, 358. 1 Mod. 55, 76, 168, 202.

Nuiſances.

1. Rex & Regina *verſus* Wilcox.

[Hill. 1 W. & M. B. R.]

Fine pardoned by general pardon, but abatement not excuſed. Vide Vaugh. 333. 1 Hawk. ch. 75. ſec. 12. 2 Hawk. c. 37. ſec. 33. Plowd. 487. 12 Co. 30.

THE owner of the glaſs-houſe at *Lambeth* was indicted for maintaining that houſe, being a nuſance, and was convicted and fined; and now it was moved, that by the act of general pardon the defendant was excuſed and diſcharged, both as to the fine and the abatement of the nuſance: But the Court upon conſideration held, that he ſhould be diſcharged only as to the fine and not as to the abatement, for that is not a puniſhment of the party, but a removal of that which is a grievance to other people, and any perſon may abate a common nuiſance.

2. Palmer *contra* Poultney.

See 2 Mod. 233. Lutw. 1586, &c.

[Mich. 8 Will. 3. C. B. 1 Ld. Raym. 276. S. C. named Shalmer *v.* Pultney.]

QUOD *permittat proſternere quædam ædificia ad nocumentum*, &c. And the Court held, that a *quod permittat* will lie *de ædificio*: but *vide Noy* 68. 3 *Cro.* 520, 402. It lies not *de mole*, *F. N. B.* 110., it lies *de fabrica*, *F. N. B.* 184., which the Court held as uncertain as *ædificium*. Alſo there may be a building without a name; and the Court held, that whether the nuſance was by the tenant or a ſtranger, the plaintiff may maintain a *quod permittat*, for it is the ſame prejudice to the plaintiff. *F. N. B.* 184. *Et nota*; In a *quod permittat* the jury have a view; but that did not weigh with the Court, for they ſaid that could be no direction to the ſheriff, though it might to the jury.

Quod permittat lies de ædificio. 9 Co. 53, 54. Cro. Jac. 555. Cro. Car. 185. 1 Rol. Rep. 394. 3 Bulſt. 197. 1 Jones 222. 2 Rol. 144, 145, 565.

3. Lodie *verſus* Arnold.

[Mich. 9 Will. 3. B. R.]

TRESPASS for breaking his cloſe, and throwing bricks and other materials there lying *erga confectionem domus de novo erect.* into the ſea; the defendant ſhewed it was a nuſance, being a houſe built acroſs the way, and that he pulled down the walls, &c. and they rolled into the ſea. The plaintiff demurred, and judgment was given for the defendant: And, * 1ſt, The Court ſeemed to agree, that the treſpaſs, which is juſtified, is not the treſpaſs complained of, for that was throwing materials there lying; this, which is confeſſed, is pulling down a wall. 2dly, That when *H.* has a right to abate a public nuſance, he is not bound to do it orderly, and with as little hurt, in abating it, as can be; and therefore was not anſwerable in this caſe for the rolling into the ſea. In the caſe of *James* againſt *Haward*, the defendant might have opened the gate without cutting it down; yet the cutting was lawful; and the Court denied *Hill*'s caſe, 3 *Cro.* 384., that matter of aggravation need to be anſwered. But, 3dly, the Court held, that the declaration was repugnant and inſenſible; there could not be materials towards the building of a houſe *erect.*, which is already built.

In juſtification by abatement of a nuiſance, it need not be ſhewn that he did it, doing as little hurt as could be. 1 Jon. 221. 1 Hawk. c. 75. ſec. 22.

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Cro. Car. 184, 185. Vide 5 Co. Penruddock's Caſe. Mo. 705, 3 T. R. 292. 1 Lev. 31. 1 Salk. 213, 408.

6 Mod. 116. S. C. Vide prox. pag.

4. Roſewell *verſus* Prior.

[Mich. 10 Will. 3. B. R. 1 Ld. Raym. 39. S. C.]

In caſe for ſtopping lights, it muſt appear that the lights were ancient. See 6 Mod. 116, 314. 1 Mod. 55. 1 Lev. 122, &c. & infra. 2 Lev. 194. 9 Co. 58. Cro. El. 402. Conſuevit after verdict in ſuch action, imports uſage time out mind. 6 Mod. 20, 313, 314. Comber. 481. S. C. 1 Vent. 274, 237. Show. 7, 64. 3 Mod. 48. 3 Keb. 133. Pop. 170. Hutt. 136. Hob. 131. Carth. 454.

IN *an action upon the caſe* for erecting a ſhed upon the defendant's ground, ſo near the plaintiff's houſe that it ſtopped up his lights; the plaintiff declared, that he was poſſeſſed of a houſe which had windows, *per quas lumen inferebatur & inferri conſuevit.* After verdict for the plaintiff, it was moved in arreſt of judgment, that the houſe was not ſaid to be an *ancient meſſuage*, and the defendant appeared not to be a wrong-doer; for one may erect a ſhed on his own ground againſt another's windows, if they are not ancient lights. 3 *Cro.* 118. And all the precedents of ſtopping lights have it, either *antiquum meſſuagium* or *antiqua lumina.* 1 *Cro.* 325. *Pop.* 170. 2 *Cro.* 373. *Yelv.* 215. *Sed per Cur.* The word *conſuevit* imports uſage time out of mind, and we muſt intend, after verdict, that uſage time out of mind was proved; and ſo indeed it was in this caſe, for otherwiſe the jury could not have found for the plaintiff. The Court ſeemed to think this declaration would not have been good upon demurrer.

Caſes B. R. 215, 635. Holt 500. Lilly Ent. 31, 82, 83, 516. 1 Sid. 167. 1 Vent. 237.

3 Lev. 133. 1 Vent. 236, 248.

5. Dominus Rex *verſus* Roſewell.

[Hill. 10 Will. 3. B. R.]

H. erects a houſe which ſtops my lights, I may pull it down. See 6 Mod. 314, &c. ſupra, 1 Vent. 237, 239, 274. 2 Lev. 194. Ray. 87. 1 Sid. 167. 3 Bl. Com. 5.

IF *H.* builds a houſe ſo near mine that it ſtops my lights, or ſhoots the water upon my houſe, or is in any other way a nuſance to me, I may enter upon the owner's ſoil and pull it down; and for this reaſon only a ſmall fine was ſet upon the defendant in an indictment for a riot in pulling down ſome part of a houſe, it being a nuſance to his lights, and the right found for him in an action for ſtopping his lights.

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S. C. ante 459. and 6 Mod 116.

6. Roſewell *verſus* Prior.

[Hill. 13 Will. 3. B. R. 1 Ld. Raym. 713. S. C. Pleadings Lilly 81.]

F. N. B. 124. H. Cro. Jac. 373. 1 Vent. 48. 1 Mod. 27. A tenant for years erects a nuſance, and makes an

IN an *action upon the caſe*, for that the plaintiff being ſeiſed of an ancient houſe and lights, the defendant had erected, *&c.*, whereby they were ſtopped. There was a former recovery for this erection, and this action was for the continuance; and the caſe was, tenant for years

years erected a nuſance, and afterwards made an under-leaſe to *J. S.* The queſtion was, Whether, after a recovery againſt the firſt tenant for years for the erection, an action would lie againſt him for the continuance after he had made an under-leaſe? *Et per Cur.* It lies; for he transferred it with the original wrong, and his demiſe affirms the continuance of it: He hath alſo rent as a conſideration for the continuance, and therefore ought to anſwer the damage it occaſions. *Vide Jones* 272. Receipt of rent is upholding. 2 *Cro.* 372, 555. The action lies againſt either at the plaintiff's election.

Under leaſe to B. plaintiff may have an action againſt either. See 6 Mod. 118, 314. *Ante* 459. &c. ib. 2 Roll. 144, 145. Cro. Car. 185. 3 Bulſt. 197. 1 Jones 222. 9 Co. 55. a. Vide 4 T. R. 328.

7. Domina Regina *verſus* Wigg.

[Paſch. 4 Ann. B. R. 2 Ld. Raym. 1163. S. C.]

INDICTMENT for keeping hogs in ſome of the back ſtreets of *London, contra formam ſtatuti.* Mr. *Whitacre* moved to quaſh it, becauſe the ſwine are forfeited by the ſtatute 2 *W. & M., ſeſſ.* 2. *cap.* 8. *ſect.* 20. *Ergo* no indictment lies, at leaſt not *contra formam ſtatuti:* He compared it to the caſe of the Queen againſt *Watſon*, which was an indictment for keeping an alehouſe, and held not to lie, becauſe there is another remedy. *Curia:* Where a new penalty is applied for a matter, which at common law was an indictable offence, as in this caſe for keeping ſwine in the city, which is a nuſance, either remedy may be purſued; but where the ſtatute makes the offence, that remedy muſt be taken which the ſtatute gives (*a*): And as to its being *contra formam ſtatuti*, that is ſurpluſage; but if that was a fault, they ſaid they would not quaſh it, being for a nuſance, but he ſhould demur; accordingly it was demurred to, and came on in the paper, and judgment given for the king (*b*). Afterwards Mr. *Whitacre* moved to ſet aſide the judgment, alleging ſurpriſe and want of notice. *Sed non prævaluit:* But no counſel appeared for the defendant when judgment was given.

Keeping ſwine in a city, a nuſance at common law. See 2 Rol. Abr. 140, 141. Cro. Car. 570. 9 Co. 57, 58. 2 Show. 27, 30, 81, 327. Palmer 536. Hutt. 136. 1 Rol. 558. 1 Bulſt. 115. Godb. 183. Br. Action ſur le Caſe 123. Where the ſtatute makes the offence, no other remedy can be purſued but what the ſtatute gives; otherwiſe of a crime indictable before. Ante 45.

(*a*) *Vide* note to *Stephens* v. *Watſon*, *Ante* 45.

(*b*) *Vide acc. ante* 212. *Cowp.* 648. *Doug.* 441. 2 *Hawk.* c. 25. ſec. 115. 5 *T. R.* 163.

*** For an enumeration of caſes which are or are not nuiſances, *vide* note to 6th edit. of 1 *Hawk.* c. 75. ſec. 11. pa. 363.

See 2 Mod. 173. 3 Mod. 108. 2 Show. 68, 475. 5 Mod. 402. 1 Chan. Caſ. 11. 1 Chan. Rep. 231. Poſt. 549.

Oaths and Affidavits.

1. Salloway *verſus* Whorewood.

[Mich. 8 Will. 3. B. R.]

Where, upon ſhewing cauſe, new affidavits may be read to ſupport the rule.

UPON a rule to ſhew cauſe, the plaintiff offered ſeveral new affidavits, and this diverſity was taken, *viz.* Where they contain new matter, and where they tend only to confirm what was alleged and ſworn when the rule was made; in the latter caſe they may be read, and not in the former.

2. Dominus Rex *verſus* Jones.

[Hill. 8 Will. 3. B. R.]

Affidavits taken before commiſſioners, according to 29 Car. 2. *c.* 5. muſt be in a cauſe in court. 5 Mod. 74. S.C. 3 Lev. 426. Holt 501.

IF affidavits taken before commiſſioners in the country, according to 29 *Car.* 2. *c.* 5., be expreſſed to be in a cauſe depending between *A.* and *B.*, and there is no ſuch cauſe in court, they cannot be read, becauſe the commiſſioners have no authority to take them, and there can be no perjury; otherwiſe if there be a cauſe in court, and this concerns ſome collateral matter.

3. Davis *and* Carter's *Caſe*.

Where an affidavit of a perſon pilloried may be read. Vide poſt. 513, 514, 689. 5 Mod. 15. 3 Salk. 461.

Vide Str. 1148. 2 Hawk. ch. 46. ſec. 23.

DAVIS and *Carter* ſtood in the pillory, and the Court would not allow their affidavits to be read; *Hill.* 7 *W.* 3. *B. R.* But *Mich.* 4 *Ann. B. R.* a motion was made to ſet aſide a judgment for irregularity on the defendant's affidavit; and Mr. *Whitacre* objected to the reading it, becauſe he was convict of perjury. *Et per Holt*, C. J. Muſt he therefore ſuffer all injuries, and have no way to help himſelf? *Powell*, J. You ought to have the record of conviction in your hand when you make this objection. But *per Holt*, C. J. If he had, it would be nothing to the purpoſe.

Obligation.

See Cro. Jac. 190, 202, 208, 290, 338, 522, 603, 607. 2 Lev. 35, 166, 220.

1. Henderſon *verſus* Foſter.

[Hill. 3 W. & M. B. R.

IN *debt* the plaintiff declared on a bond, *in trigint. & ſex libris ſolvend.*, &c., and upon *oyer* the words of the bond were *ſex trigint. libris*, and it was held well, and no variance; for it ſhall be taken as one word, as *tres vigint. dies Junii* was taken for the 23d of *June*. *Yelv.* 193. 3 *Salk.* 74.

Sex triginta libris, held well. Comber. 187. S. C. 477. 2 Show. Caſe 422. 2 Rol. Abr. 146, 147. Carth. 204. S. C. Skin. 310. Com. Oblig. B. 3.

2. Cromwell *verſus* Grunſden.

[Paſch. 10 Will. 3. B. R. 1 Ld. Raym. 335. S. C.]

5 Mod. 281. S. C. Vide ib. les Pleadings. 3 Salk. 73, 74. Holt 502. Caſes B. R. 193.

IN *debt* upon an obligation, the plaintiff declared, *quod cum Robertus Erlin, primo die Julii* 1674, *per ſcriptum ſuum obligatorium conceſſit ſe teneri & firmiter obligari in quadragint. libris*, &c. *Et profert*, &c. *cujus dat. eſt eiſdem die & anno.* Upon *non eſt factum* pleaded, the jury found the defendant made a deed *in hæc verba*, and that was, *in premid. vigin. in quadrans libris*, dated the 1ſt of *July*, *anno regni Car. 2. millimo ſexcent. ſeptua. qto.*, and ſigned *Robert Erlwin*, conditioned to pay 20 *l.*, and if this be the ſame deed, &c. *Et per Cur.*

Quadrans libris in a Bond. Cro. Car. 116. Mo. 864. 2 Bulſt. 241. Lutw. 422, 423. 2 Jones 58. 1 Brownl. 110. Bond made by Erlin, ſubſcribed Erlwin, variance not material. 2 Show. 504.

1ſt, The variance between the name ſigned, which is *Erlwin*, and the name in the obligation, which is *Erlin*, is not material, becauſe ſubſcribing is no eſſential part of the deed; ſealing is ſufficient: The bond is a deed without it, and ſo it is of the year of the king. *Vide Yelv.* 193.

Inſenſible words rejected. Vide prox. pag. pl. 3. 2 Mod. 285. Com. Oblig. B. 3.

2dly, The Court held the words *in premid. vigin.*, and alſo the *anno regni Car. 2. millimo ſexcent. ſeptua. qto.*, to be void for inſenſibility; and being inſenſible ſhall be rejected, the reſt being ſenſe without them.

3dly, They held that the word *quadrans* had been void and inſenſible, if it had ſtood by itſelf, as in caſe there had been no condition, or if the condition had been collateral; but ſince it has relation to the condition, they would take it to be explained by the condition, and to ſignify 40*l.*, there being ſomewhat like *quatuor* or *quadragint.* in it, and

Sum in the obligation expreſſed in inſenſible words, explained by the condition. 2 Cro. 146. Yelv. 65. Cro. El. 417. Yelv.

105. Styl. 241, 257. 2 Rol. 147. l. 37, 45. Cro. Car. 416. 10 Co. 133.

and there are caſes as ſtrong and of as odd words. *Hob.* 119. *Quamquegenta* for 500*l.* *Yelv.* 95. *Cro. Car.* 147. *Cro. Jac.* 208. 1 *Brownl.* 62. 2 *Ro. Ab.* 146, 147. *Hob.* 19. *doubted.* In moſt caſes where the *gent.* or *gint.* or the *ſex* or *ſept.* are right, the obligation has been held well. *Vide* 2 *Jones* 48. 1 *Cro.* 416, 418. 2 *Cro.* 338.

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Impoſſible date is no date, and the plaintiff muſt declare of a time of making. 3 Lev. 348. 5 Mod. 248, &c. Yelv. 193. 5 Co. 5. 2 Rol. Abr. 706. 27. l. 25, &c. Fareſt. 38. Gerens dat. muſt be underſtood of the expreſs date; cujus dat. may be the delivery. 2 Brown. 110. Styl. 414. 2 Rep. 5. Cro. Eliz. 603. Noy 21.

4thly, An impoſſible date is no date; and where there is no date, the plaintiff nevertheleſs muſt declare of it as made at a certain time, and it is better to reſt there without *cujus dat. eſt eiſdem, &c.* or *gerens dat. eiſdem;* for that ties it up to the bond mentioned in the declaration; and if that be taken to be the expreſs date, then there is a variance; and the Court held, That if the Plaintiff's declaration had been *gerens dat.* it had certainly been naught, becauſe that could refer to nothing but the expreſs date; but being *cujus dat.* the Court would intend it of the real date, which is the delivery, and not of the expreſs date; becauſe that being inſenſible, and as no date, it could not properly be applied to that. *Vide* 2 *Yelv.* 193.

And the Chief Juſtice denied the Caſe, 2 *Cro.* 136.; and held, that if *H.* declares on a bond, as bearing date the 6th of *May*, he cannot upon *non eſt factum* give in evidence a bond bearing date at another day; but he may give in evidence a bond that bears date the 6th of *May*, though it was delivered at another day. Adjudged.

3. Wells *verſus* Treguſan.

[Mich. 7 Ann. B. R.]

Condition of a bond (reciting a debt) not to pay, is repugnant. See 2 Show. 15, 16, 504. 1 Lev. 77, 85. Raym. 61. 2 Saun. 79, 80. 2 Mod. 285. Rep. A. Q. 191, 199. S. C.

DEBT on a bond for 100*l.* defendant demands *oyer* of the condition, which was, whereas the defendant is truly indebted to the plaintiff in 50*l.* Now the condition is ſuch, that if the defendant do not pay the ſaid 50*l.* on or upon, *&c.* then the obligation to be void, *&c.* and pleads, that he did not pay the ſaid 50*l.* The plaintiff demurred and had judgment; for when the condition recites debt, and after lays an obligation not to pay it, it is in that repugnant. *Vide* 1 *Sid.* 109. 1 *Lev.* 77. 39 *H.* 6. 10. *a.*

Occupant and Occupancy.

Vide Vaug 190, &c. 3 Leon. 36. 6 Mod. 66. Carth. 65, 66. 2 Keb. 250.

Oldham *verſus* Pickering.

[Mich. 8 Will. 3. B. R. 1 Ld. Raym. 96. S. C.]

IN *attachment ſur prohibition* the caſe was briefly thus: *Thomas Oldman* being ſeiſed of a meſſuage in the county of *Cheſter*, to him and his aſſigns for three lives, died inteſtate without children, leaving only *Anne Pickering* his ſiſter: Adminiſtration was commited to *Margaret Oldham* the plaintiff, whom the defendant now ſues in the ſpiritual court of *Cheſter* for diſtribution, and to exhibit an inventory, which ſhe exhibited and omitted thereout the eſtate *pur auter vie*; whereupon the ſingle queſtion was this, Whether an eſtate *pur auter vie* be not diſtributable in like manner, as inteſtates goods and chattels are, according to 22 & 23 *Car.* 2. by force of 29 *Car.* 2. *c.* 3. which enacts for the amendment of the law, that an eſtate *pur auter vie* ſhall be deviſable, and if no ſuch deviſe thereof be made, the ſame ſhall be chargeable in the hands of the heir, if it ſhall come to him by reaſon of a ſpecial occupancy, as aſſets by diſcent; as in caſe of lands in fee-ſimple; and in caſe there be no ſpecial occupant thereof, it ſhall go to the executors or adminiſtrators of the party that had the eſtate thereof by virtue of the grant, and ſhall be aſſets in their hands.

Eſtate pur auter vie are only aſſets for the payment of debts, not of legacies, unleſs given thereout expreſsly; nor diſtributable. Vide ante 415, &c. Carth. 376. S. C. Comb. 388, 475. S. C. 3 Salk. 137. Holt 503. Caſes B. R. 103. 3 D. 379. 8, 30. 409. p. 5.

And after a long argument by *Cheſhire* for the plaintiff, and by *Ward* for the defendant, the whole Court, *viz.* *Holt*, *Rokeby*, *Turton*, and *Eyre*, unanimouſly gave judgment, That the prohibition ſhould ſtand, and that an eſtate *pur auter vie* belonging to an inteſtate, was not diſtributable; for, notwithſtanding this alteration by the ſtatute, it remains a freehold ſtill; and the amendment of the law in this particular, was only deſigned for the relief of creditors; that, if it came to the heir by reaſon of a ſpecial occupancy, it ſhould be in his hands aſſets by deſcent, that is, liable to the payment of thoſe debts where the heir is chargeable, and of thoſe only; but if there was no ſpecial occupant, then it ſhould go to the executors or adminiſtrators, *i. e.* they ſhould be in the room of the occupant, and it ſhall be aſſets in their hands, *i. e.* they ſhall be bound to pay the debts of the deceaſed to the value thereof; ſo that it is not ſo much as aſſets to pay legacies, except ſuch as are deviſed particularly thereout, the ſtatute making

making it aſſets only for this particular intent, to pay creditors; and no debts appearing in this caſe, the adminiſtrator is as it were the occupant, and ſhall not be compelled to make any diſtribution thereof, as he ſhall of goods and chatteis, according to 22 & 23 *Car.* 2. (*a*)

(*a*) *Vide* Duke of *Devon* v. *Atkins*, 2 *P. Wms.* 282. *Witter* v. *Witter*, 3 *P. Wms.* 101. In the latter caſe it was held, that an eſtate *pur auter vie* was diſtributable in *Chancery*; and it is enacted by ſtat. 14 G. 2. ch. 20. that the ſame ſhall be diſtributed as perſonal eſtate.

See 1 Lev. 2, 76. 2 Lev. 71, 150, 245. 3 Lev. 200. 145, 288. 1 Latw. 381, 1562. Raym. 53.

Offices and Officers.

1. Jones *verſus* Pugh.

[Mich. 3 W. & M. B. R.]

Judicial office may be granted to two; but if one dies, it ſhall not ſurvive, unleſs ſaid to the ſurvivor. Vide 2 Mod. 95, 96. 1 Vent. 296. S. C. 4 Mod. 16, 17, 19, 27. 1 Show. 288. Cases B. R. 10, 11. Co. 3, 6. Carth. 213, 350. Comb. 334. Skin. 446, 580. Com. 5. Officer, lit. 4. 3d ed. pa. 131.

CASE for diſturbing the plaintiff in his office of vicar general. A ſpecial verdict was found, *viz.* that the biſhop of *Landaff* granted the office of vicar general to the plaintiff and *J. S. habend. conjunctim & divisim, exercend. per ſe vel ſufficien. deputat'*. It was objected, that a judicial office could not be granted to two; for if they differ, nothing can be done: Anſwer, That may be ſaid of four judges, as in *B. R.* and in miniſterial offices, as two ſheriffs: The Court held the grant good; and ſaid, If an office be granted to two, and one dies, the office does not ſurvive, but determines; as if two ſheriffs, and one dies, the other cannot act; otherwiſe if granted to two and the ſurvivor of them.

4 Mod. 276, 277. S. C.

2. Dominus Rex *verſus* Kemp.

[Trin. 7 Will. 3. B. R. 1 Ld. Raym. 49. S. C.]

King grants an office to A. durante beneplacito, and afterwards grants the ſame to B. to commence after the death, ſurrender or for-

A *Scire facias* was brought to repeal letters patent, whereby King *Charles* the Second granted to the defendant *Kemp* the office of ſearcher in the port of *Plymouth*. The caſe was, King *Charles II.* had granted this office to *A. durante beneplacito*; and afterwards by other letters patent, reciting the firſt, granted it to *B.* for life, to commence after the death, ſurrender, or forfeiture of *A.*

A. Afterwards *B.* ſurrendered to the king, who, in conſideration of the ſurrender, granted the office to the defendant *Kemp*, to commence after the * death, forfeiture, ſurrender, or other determination of the eſtate of *A.*

feiture of A. the latter grant is good. 3 D. 161. p. 12. Comb. 334. Skin. 445, 530. Carth. 350.

Caſes B. R. 77. Holt 419. 2 Rol. Abr. 154. Com. Officer, B.

It was objected, that the grant and patent to *B.* was void, becauſe *A.*'s eſtate, being at will, could not be ſurrendered nor forfeited. Alſo an eſtate of freehold cannot depend upon an eſtate at will.

* [466]

Cro. Car. 279. 6 Rep. 35. Carth. 350. S.C.

Et per Cur. An eſtate at will in lands cannot be ſurrendered, becauſe it is determinable by the will of either party; but ſuch an office at will is not properly at the will of both parties, but at the will of the king only; the party cannot determine his will, but by ſurrender; for if it be an office of truſt, a mere forbearance to execute will be an offence, and finable; and ſurrender is the conſtant practice in ſuch caſes. So did the Chief Juſtices *Hale* and *Scroggs*.

Office at will is at the will of the king, and not of party, and may be ſurrendered. Hob. 150, 151. Dyer 80. b. 259. a.

2dly, It may be ſaid forfeitable in ſome meaſure, and the king's tenants at will may be ſaid to forfeit; for in caſe of forfeiture, the king will be informed by inquiſition before he determine his will, and then upon the return of the inquiſition the office is forfeited; but if it were an eſtate for life, there muſt be a *ſcire facias* to repeal the letters patent.

King's tenant at will may forfeit, and there muſt be an inquiſition. 2 Brownl. 242.

3dly, If the king had turned out *A.*, the grant to *B.* may take effect, though not immediately, yet after the death of *A.* the king ſhall appoint another in the time.

Dyer 197. b. 1 And. 6. 3 Leon. 5.

4thly, That a freehold of lands cannot be granted to commence *in futuro*, or depend upon an eſtate at will; but a new office, or a rent *de novo*, may be created to commence *in futuro*, *&c.*, for it is the creature of him that makes it; and it is no otherwiſe in being than it is in grant. And the king doth not grant a reverſion, but in reverſion; and that not in reſpect of a particular eſtate, but becauſe he is pleaſed to grant *in futuro*.

A freehold to commence in futuro may be in a rent de novo, or in an office. Vide poſt. 577. 4 Mod. 280, 281.

3. Gulliford *verſus* De Cardonell.

[Hill. 8 Will. 3. B. R. S. C. Com. 1.]

IN *debt* on an obligation; on *oyer* the condition was, that whereas the defendant was made deputy to the plaintiff in his office, if he pay the plaintiff half the profits, then, *&c.* The defendant pleaded the ſtatute 5 *&* 6 *Ed.* 6. *Et per Cur.* This bond is not within the ſtatute, becauſe the condition is not to pay him ſo much in groſs, but half the profits, which muſt be ſued for in the principal's name;

Bond given by deputy to principal to pay him half the profits of the office, good. See 6 Mod. 234, &c. 3 Keb. 551, 652, 678, 711, 717. Poſt.

468. Cro. Car. 361. Cro. Jac. 269. 2 Vent. 79. Comb. 356. S. C.

for they belong to him, though out of them a ſhare is to be allowed to the deputy for his ſervice.

Caſes B. R. 9. Holt 506. Str. 1027.

[467] Vide Raym. 53.

4. Saunders *verſus* Owen.

[Trin. 10 W. 3. B. R.]

Cuſtos rotulorum may appoint the clerk of the peace without deed. See 3 Mod. 150. quære 147. Vide Noy 147, 148. Carth. 426. S. C.

IN an aſſize of novel diſſeiſin for the office of clerk of the peace of *Kent*, the recognitors found a ſpecial verdict, *viz.* That the Earl of *Winchelſea*, being *cuſtos rotulorum* of that county, made *P. Owen* clerk of the peace, to hold at his pleaſure, by writing under his hand and ſeal; and, becauſe the juſtices of peace at ſeſſions ſcrupled to admit him upon this paper, the Lord *Winchelſea* came into court, and ſaid, *I nominate* P. Owen *to be clerk of the peace, according to act of parliament.*

5 Mod. 386. S. C. 3 Salk. 230. Carth. 426. Comb. 317. Caſe B. R. 199. Lil. Ent. 278 1 Ld. Raym. 163, 164. Sho. 530.

And the Court held, that it always belonged to the *cuſtos rotulorum* to nominate the clerk of the peace, but the clerk of the peace was removeable whenever the *cuſtos* was removed or changed; and moreover was removeable at the will of the *cuſtos* till 32 *H.* 8., which makes him to continue in *quouſque* the *cuſtos* ſhall continue in. Now, by the late act, he is to continue for life; and though the words be, *give and grant to him*, yet it is only an appointment, and conſequently may be without deed: That it cannot be a grant from the *cuſtos*, or enure as ſuch, is plain, becauſe the *cuſtos* is only at will; and he that has an office at will cannot make a grant for life, becauſe there is no original eſtate ſufficient to bear it; therefore this muſt enure as an appointment, or the execution of a power given by the ſtatute; like a power to an executor to ſell, or a tenant for life to make leaſes; the conſequence of all which is, that this was a good appointment, though without deed; for whatever is to take effect out of a power or authority, or by way of appointment, is good without deed; otherwiſe, where it takes an effect out of an intereſt, and is to enure as a grant; for then, if it be of a thing incorporeal, it muſt be by deed. Held upon a writ of error of a judgment in the Common Pleas.

Whatever is to take effect out of an authority, or by way of appointment, is good without deed.

5. Anonymous.

[Mich. 11 Will. 3. B. R.]

SERJEANT *Darnell* moved againſt the clerk of the county-court, for granting a *replevin* without taking a bond or ſurety of the plaintiff to proſecute; but the Court made

made no rule, becauſe it was a ſtale cauſe of complaint near two years ago; beſides, it was only a ſingle inſtance; but the Court ſaid, that when it grew into a practice, as if a ſheriff conſtantly or frequently uſed to let perſons at large without bail, then it is an abuſe of his office, and the Court will interpoſe. *Per Cur.*, *Holt abſente*, Bring your action. Vi. 4 Bur. 2007.

6. Godolphin *verſus* Tudor. [468]

[Mich. 3 Ann. B. R.]

SIR *William Godolphin*, being auditor of *Wales*, made a deputy *quamdiu ſe bene geſſerit*, who, by articles of agreement between them, was to have the fees, and in conſideration thereof to pay Sir *William* 200 *l. per annum*, and ſave him harmleſs. In debt on the bond for performance, judgment was given againſt the plaintiff. 1ſt, The Court held this an office within the ſtatute 5 & 6 *Ed.* 6. c. 16.

Bond by deputy to pay a certain ſum out of the ſalary or profits, is good; but where it is without relation to the ſalary or profits, void Vide ante 466. pl. 3. Keb. 552, 659, 678. 711, 17. 6 Mod. 38, 34. S. C. 3 Salk. 251.

2dly, The Court held, that where an office is within the ſtatute, and the ſalary is certain, if the principal make a deputation, reſerving a leſſer ſum out of the ſalary, it is good: So if the profits be uncertain, ariſing from fees, if the principal make a deputation, reſerving a ſum certain out of the fees and profits of the office, it is good; for in theſe caſes the deputy is not to pay, unleſs the profits riſe to ſo much; and though a deputy by his conſtitution is in place of his principal, yet he has no right to the fees, they ſtill continue to be the principal's; ſo that as to him, it is only reſerving a part of his own, and giving away the reſt to another; but where the reſervation or agreement is not to pay out of the profits, but to pay generally a certain ſum, it muſt be paid at all events, and ſuch bond is void by the ſtatute.

Vide H. Bl. Rep. 331.

N. This judgment was afterwards affirmed in the Houſe of Lords. 1 *Bro. P. C.* 101.

7. Lee *verſus* Drake.

[Trin. 4 Ann. B. R.]

CASE wherein the plaintiff declared, *quod cum extitiſſet* clerk of ſuch a pariſh, the defendant diſturbed him in the exerciſe of his office, and hindered him to ſit in the clerk's ſeat, *per quod* he loſt the profits of his office. It was objected, that this was rather a ſervice or employment than an office; that if it be an office, it is eccleſiaſtical, for of

Caſe for diſturbing him in the exerciſe of the office of pariſh-clerk. Vide 6 Mod. 19, 21, 233. 4 Mod. 418. 2 Mod. 228. Mo. 706.

common right the parſon appoints the clerk, and the Court will not intend a cuſtom; and unleſs a clerk comes in by the election of the pariſhioners according to cuſtom, he has not a temporal right; and the Court will not grant a *mandamus* for a clerk, without an affidavit that he is appointed by the pariſh. 2dly, It does not appear that any fees appertain unto this office, and no action lies at common law for diſturbance in the enjoyment of a ſeat in the church, without a temporal right; and ſo it is here. *Adjournatur.*

Vide ante 435, *Non-attendance is good cauſe of forfeiture of an office.*

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Vide Hard. 11, 12. 3 Lev. 290. Vaugh. 62, 64, 153. 3 Mod. 335.

Office for the King.

1. Layton *contra* Manlove.

[Mich. 2 W. & M. In Canc.]

Inquiſition finding ſome points well, and nothing as to others, may be ſupplied by melius inquirendum; otherwiſe, if defective in the points found.

SEVERAL voluntary eſcapes being committed by *Manlove* the warden of the *Fleet*, an inquiſition was found, and the king granted the ſaid office to *Layton*; and now the commiſſioners of the great ſeal refuſed to ſeal the ſame, being of opinion that the inquiſition was void, and ought to be quaſhed, becauſe it does not find what eſtate *Manlove* had in the office; for there are two ſorts of inquiſitions, the one to inform, and that need not be ſo certain, *Mo.* 308., the other to veſt and entitle the king to grant, and that muſt be certain. *Jones* 71, 77. 3 *Cro.* 895. And here no certain eſtate is found to veſt, and a *melius inquirendum* cannot ſupply this defect; for where an inquiſition is defective and uncertain, that cannot be ſupplied by *melius inquirendum*; but where it finds ſome points and not others, and that which is found is well found, there may be a *melius inquirendum*. *Per Holt* C. J., *Pollexfen* C. J., and *Nevil* J. (*a*)

(*a*) In the caſe *ex parte Dupleſſis*, 2 *Vez.* 538. it was ruled, that finding a perſon not an alien did not conclude the crown, and that a *melius inquirendum* ſhould go. The rule laid down here, and in the report of this caſe, 3 *Mod.* as to a *melius inquirendum*, is conſidered as erroneous by Ld. *Hardwicke*, and Ld. Ch. Baron *Parker*, who aſſiſted him. A doubt is ſuggeſted as

to the fidelity of the report, as *Levinz* is ſilent upon the ſubject. The Lord Chancellor alſo intimates a doubt as to the principal point, becauſe, when no eſtate is found, it ſhould be preſumed that the office is held in fee. He obſerved, that all that could be ſenſibly collected from the rough account of the caſe in the books, is a contention that the crown might avail itſelf of the forfeiture. A *melius inquirendum* is only grantable on the part of the crown, 3 *Atk.* 5.

2. Linch *verſus* Coote.

[Hill. 8 Will. 3. B. R.]

TENANT for life, remainder to his firſt ſon in tail, remainder to *J. S.* in fee: Tenant for life is attainted of high treaſon, and dies without iſſue. It was objected, that the whole eſtate being veſted in the king by 33 *H.* 8., without any office finding the ſpecial matter, [*the perſon*] in remainder cannot enter, for the ſtatute veſts it in the king like a general office; and if a general office had been found, it would have been ſuppoſed a fee. *Holt*, C. J. No other eſtate veſts in the king, by virtue of the act of parliament, than the party attainted had; juſt as if a ſpecial office had been found: And therefore in this caſe, as in that, the remainder-man may enter on the king, his eſtate being determined, for the ſtatute ſaves the rights of others; otherwiſe, where an office finds an eſtate in fee in the party attainted, for then it muſt be avoided by traverſe, or *amoveas manum*. *Vide Dyer* 335. *b. Hob. Sheffeild* and *Ratcliffe*, *Moor* 109. 3 *Cro.* 640. *Dy.* 354. *pl.* 230.

A. tenant for life, remainder to B. in fee; A. is attainted. King ſeizes, B. may enter on the king, otherwiſe if an office had found A. ſeized in fee. Vide Stamf. Prærog. 67. Fearne 427, (209).

Orders of Juſtices of the Peace. [470]

[*Vide* Titles *Apprentices*, *Baſtards*, *Juſtices of the Peace*, *Poor*, *Seſſions*. See alſo *Burn*'s *Juſtice*, under the Titles *Poor*, &c. &c.; and *Burrow*'s *Seſſions Caſes*.]

1. *Inter* Inhabitan. Dumbleton *and* Beckford.

[Paſch. 7 W. 3. B. R.]

ON a *certiorari* was returned an order of ſeſſions in *Glouceſterſhire*. A girl of near thirteen years old had been at *Dumbleton* in the ſaid county, and had always lived there

Order to remove to B. becauſe father laſt ſettled there, ill. Ante

427. Comb. 380, 381. Mod. Caſes 87. Set. and Rem. 158. S. C.

there with her grandmother: Her father was legally ſettled at *Beckford* in the ſame county: She wanting relief, was by the order charged on *Beckford*, becauſe her father was ſettled there. *Et per Cur.* The order muſt be quaſhed (*a*); for though till eight (*b*) years children are counted nurſe-children, yet they muſt afterwards have maintenance from the pariſhes where they themſelves are ſettled, and for any thing appears ſhe may have gained a ſettlement.

(*a*) *R. acc. Foley* 271. 1 *Seſſ. caſe* 45. *Vide* 1 *T. R.* 164.

(*b*) The law is now ſeven years. *Vide poſt.* 528.

2. Anonymous.

[Mich. 7 Will. 3. B. R.]

In orders to diſcharge apprentice, the very diſcharge under ſeal need not be returned. Vide poſt pl. 4. 1 Saund. 316.

IF an apprentice be diſcharged from his maſter, the ſtatute requires that the diſcharge be under the hands and ſeals of four juſtices of peace; but, in a *certiorari* to remove the order, it is ſufficient in the return to take notice of the order ſo made; for it is not neceſſary to certify the diſcharge itſelf.

3. Dominus Rex *verſus* Randall.

Seſſions cannot ſuppreſs an alehouſe licenced, unleſs for diſorder. 3 Salk. 27. S. C. Holt 405. Set. and Rem. 265.

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BY a *certiorari* two orders were removed from the ſeſſions of *Middleſex*; the firſt whereof recited, That whereas *R. Randall* had lately taken a houſe at *Hoxton*, deſigning to ſell ale and beer there; and whereas the houſe had never been inhabited but by merchants and men of quality, and there were alehouſes enough in *Hoxton* already; therefore it is ordered that no licence be granted to any houſe in *Hoxton* wherein ale was not formerly ſold, and that no licence ſhould be granted to *Randall*. The ſecond order recited, That whereas a licence was ſurreptitiouſly gotten by *Randall* from two juſtices of peace, that yet his houſe ſhould be ſuppreſſed from drawing of ale: And it was moved to quaſh theſe two orders, becauſe by 5 & 6 *E.* 6. *c.* 25., the quarter-ſeſſions cannot control two juſtices of peace in this affair. *Per Holt*, C. J. This difference has been taken: If authority be given to two juſtices of peace to do an act, and from that act there is no appeal, then it may commence at the ſeſſions; but if an appeal be given, then they cannot begin at the ſeſſions, as 43 *Eliz.* and 18 *Eliz.* till 3 *Car* 2. But the true objection here is, that except for diſorder the juſtices of peace cannot, at their ſeſſions, ſuppreſs an alehouſe licenced by two juſtices of peace; and the order was quaſhed.

Comb. 17. Brownl. 296. 1 Salk. 45, 46. 1 Saund. 249. 2 Keb. 506. Godb. 178.

4. Dominus Rex *verſus* Gately.

S. C. 5 Mod. 139, 140. Comb. 353. Set. and Rem. 131.

[Mich. 7 Will. 3. B. R.]

Power to diſcharge apprentices, extends only to ſuch trades as are ſpecially named in the ſtatute. Ante, pl. 2. S.C. Carth. 198, 366. 1 Saund. 313 to 317. 1 Vent. 174, 175. 1 Mod. 2, 286, 287. 1 Salk. 67, 68.

ON a *certiorari* it was moved to quaſh an order of Seſſions for the diſcharge of one *Edward Green* from his apprenticeſhip to the defendant *Gately:* The fact was, that *Gately* was a mountebank, and being at a place in *Yorkſhire*, where he kept a public ſtage, *Green* was by indenture bound apprentice to him in this manner, *viz.* to *Robert Gately*, ſurgeon, to learn the trade he now uſeth; and immediately he went upon the ſtage, and ever ſince continued in the employ; after which, being with his maſter *Gately* in *Middleſex*, he complained to the juſtices that his maſter did not teach him the trade, upon which they diſcharged him; this being done, *Green* ſet up the trade of mountebank himſelf. Mr. *Northey* moved to quaſh the order, the juſtices being willing, becauſe they were impoſed upon: 1ſt, He excepted to the form of the order, that they ordered the ſervant to be diſcharged from his maſter, whereas the diſcharge ſhould be mutual. 2dly, Becauſe the ſtat. 5 *Eliz.* in diſcharging apprentices is confined, and extends only to apprentices mentioned in that clauſe, and there neither ſurgeon nor mountebank is mentioned: And though a ſurgeon may be a trade within the ſtatute, which a man cannot exerciſe without ſerving an apprenticeſhip to, becauſe that clauſe of the ſtatute is general; yet this part of the ſtatute, relating to the diſcharge of apprentices, extends only to trades there mentioned. *Per Cur.* As to the firſt, the diſcharge of the ſervant is by conſequence a diſcharge of the maſter; and as to the ſecond, the clauſe of the ſtatute relating to the diſcharge of apprentices is general, and goes to all manner of apprentices, even to thoſe of merchants, as it was adjudged in *Hawkſworth's* and *Hillary's* caſe, 1 *Saund.* 314. But afterwards the Court was of opinion, that the power of diſcharging reaches only to the trades mentioned in the ſtatute, among which a ſurgeon is not mentioned; for that though as to the ſerving ſeven years apprenticeſhip, a ſurgeon comes under the general terms of arts and myſteries; yet the power of diſcharging reaches only to the trades particularly mentioned (*a*), and this point was not ſtirred in *Hillary's* caſe; and in *Watkin's* caſe, 2 *Keb.* 822. *Hale*, C. J. was of another opinion.

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(*a*) *R. contr. Str.* 663. *Adm. cont.* 1 *Bott.* 3d edit. 515.

5 Mod. 208, 209. S. C. called Rex verſ. Inhabitants of Harwe'l. 3 Salk. 256. Set. and Rem. 266.

5. *Inter* Inhabitan. Paroch. Oſwell *and* Woking.

[Paſch. 8 Will. 3. B. R.]

Seſſions may affirm or quaſh, but not ſuperſede an original order, or make a new one. Vide Faref. 10. Poſt. 483, 608. Comb. 286, 396. 5 Mod. 396.

AN order was made upon appeal, ſetting forth, That by the order of two juſtices, upon a controverſy before them between the pariſhes of *Woking* and *Oſwell*, a poor perſon was removed to *Oſwell*, and that upon complaint of the churchwardens of *Oſwell*, the ſeſſions ordered their order to be ſuperſeded, and that the perſon ſhould be removed to *Waking* aforeſaid; and it was objected, that the act of parliament only gives the ſeſſions power to affirm or quaſh, but not to ſuperſede an order, or to ſuſpend it for a time; and that the caſe before them being for the pariſh of *Woking*, an order made by them for another pariſh not concerned, *viz.* the *pariſh* of *Waking*, muſt be void, and that the word aforeſaid would not help it, becauſe *Oſwell* was the pariſh laſt mentioned. *Per Cur.* Superſeding is not a proper word, for there is a difference between a *ſuperſedeas* and a repeal. A commiſſion of *oyer* and *terminer* that is ſuperſeded may be revived by *procedendo*, without granting a new commiſſion; but that cannot be in the caſe of a repeal, though this word is commonly uſed by juſtices of peace upon ſuch occaſions; and then there is a plain difference between *Waking* and *Woking*, for by what appears they may be two diſtinct pariſhes. But no judgment was given, for the cauſe was referred to a judge of aſſize (*a*).

Ante 452.

(*a*) *Vide* 2 *Str.* 1168. 1 *Seſſ. ca.* 280. *R.* 1 *Str.* 6. That a *ſuperſedeas* to an order may, on the ground of ſurpriſe, be made by the juſtices who granted it.

6. *Inter* the Inhabitants of the Pariſh of St. Nicholas *and* St. Helen.

[Trin. 8 Will. 3. B. R.]

Where notice ſhall be preſumed. Vide poſt. pl. 17. 2 Lev. 22. Comb. 382. Set. and Rem. 192. S. C.

TWO orders were made for ſettling one *Rice*, a poor man, the firſt by two juſtices, the other by the ſeſſions on appeal, confirming the former. The fact was, *Rice* being ſix years ago legally ſettled at St. *Nicholas*'s, clandeſtinely came into the pariſh of St. *Helen*, and lived there without giving notice to the officers of the pariſh of St. *Helen* during all that time; they ſent him back to the pariſh of St. *Nicholas*, &c. And the queſtion was, Whether living in St. *Helen*'s ſo long as ſix years, ſhould not induce

induce the Court to preſume notice and other things requiſite well done, to gain a ſettlement? *Et per Cur.* No perſon, that is not a removable perſon, is to give notice; as he that rents a tenement of 10 *l. per annum*, a ſervant, *&c.*, need not give notice, becauſe they cannot be diſturbed: In this caſe, if it had appeared upon the order, that the pariſh of St *Helen* had taken notice of him, and looked upon him as one of the pariſh, as by relieving of him, making him an officer, *&c.* there, after ſo long a time, we would have preſumed notice given, becauſe the notice need not be exactly proved; for the churchwarden to whom it was given, and the witneſſes atteſting the matter, may be dead; but here it is returned on the order, that he clandeſtinely removed himſelf, ſo that he might eaſily continue in the ſame manner; wherefore in ſuch caſes we muſt conſtrue the ſtatute ſtrictly; and therefore the order was confirmed.

5 Mod. 454.

Vide poſt. pl. 17.

7. *Inter* Paroch. Trobridge *and* Weſton.

5 Mod. 325. S. C. Set. and Rem. 244. Holt 572.

[Mich. 8 Will. 3. B. R.]

IT was moved to quaſh an order of two juſtices, which recited, *Whereas* B. *is, as we are credibly informed, the place of his legal ſettlement*, not averring that it was the place of his laſt legal ſettlement, as it ought; for that the ſtatute ſays, the poor perſon ſhall be removed to the place where he was laſt legally ſettled; and it was quaſhed.

Note; Mich. 3 *Ann. B. R.* it was held, that legal ſettlement, and laſt legal ſettlement, are the ſame thing, becauſe by every new ſettlement the precedent is diſcharged.

Informed that B. is the place of legal ſettlement, ill. Vide poſt. pl. 23, 26, & pag. 492, *&c.* Ib. Comb. 413. 5 Mod. 337. Set. and Rem. 32. 1 Seſſ. Caſ. 131. Str. 73.

8. Anonymous.

[Mich. 8 Will. 3. B. R.]

AN order was made by two juſtices to remove a poor perſon, and exception was taken, that it did not appear by the order that the juſtices were of the diviſion, or that either of them was of the *quorum*: The laſt was held a good exception (*a*,) but the firſt over-ruled, for in that the ſtatute is only directory.

Removing need not be by juſtices of the diviſion. Poſt. pl. 30. Comb. 285, 400.

(*a*) By ſtat. 26 *G.* 2. *c.* 27. No order ſhall be ſet aſide for not expreſſing that one of the juſtices is of the *quorum*.

5 Mod. 321, 322. S. C.

9. *Inter* Inhabitant. Chittinſton *and* Penhurſt.

[Mich. 8 Will. 3. B. R.]

One juſtice for removal muſt be of the quorum. Vide 6 Mod. 280. 5 Mod. 349, 162, 208, 321, 322, 325, 330.

AN order for removal of a poor perſon was quaſhed, becauſe it was not ſaid that one of the juſtices was of the *quorum*. *Holt*, C. J. ſaid, This had been doubted, and perhaps * adjudged otherwiſe before; but that he was of a different opinion; for this being a ſpecial authority, it muſt appear to be purſued (*a*).

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(*a*) *Vide* note to preceding caſe.

10. Dominus Rex *verſus* Dobbyn.

Juſtices reſiding in the county, not enough. S. C. 5 Mod. 329. called Rex ver. Turner.

AN order of two juſtices was quaſhed, becauſe it did not appear they were juſtices of the county, or for the county, but only reſiding in the county.

Vide poſt. pl. 16 & 34. 2 Seſſ. Ca. 76. Bur. Set. Ca. 23.

11. Dominus Rex *verſus* Turnock.

[Mich. 8 Will. 3. B. R.]

Orders made upon 43 El. c. 2. muſt be at the quarter-ſeſſions. S. C. Comb. 418. by the name of Rex v. Charnock.

INDICTMENT for refuſing to relieve and maintain *Eliz.* the wife of his ſon *John Turnock*, according to an order made in the ſeſſions; which order was ſet forth in the indictment *in hæc verba*, viz. *Ad generalem ſeſſion. pacis tent. apud Marlb. in & pro com.* Wilts, *&c.*; and, at the motion of Mr. *Eyre*, the indictment was quaſhed, becauſe the order was only ſaid to be made at the general ſeſſions, and not at the general quarter-ſeſſions; for the quarter-ſeſſions are appointed by 2 *H.* 7. *c.* 4., though it appears by the ſame ſtatute, that there may be a general ſeſſions at other times; and 43 *Eliz. c.* 2. *ſ.* 7. appoints orders in theſe caſes to be made at the general quarter-ſeſſions.

12. *Inter* Inhabitan. *of* Much-Waltham *and* Peram *in* Eſſex.

[Mich. 8 Will. 3. B. R.]

Set. and Rem. 274. S. C. Baſtard born pending an illegal or-

MR. *Comyns* moved to quaſh an order of ſeſſions for the ſettlement of a baſtard-child of *E. L.* She being big with child, a little before her delivery was removed, by the order

order of two juſtices of peace, from *Much-Waltham* to *Peram*; before the next ſeſſions ſhe was delivered at *Peram* of a baſtard-child. At the ſeſſions *Peram* appealed, and the juſtices adjudged the woman to be legally ſettled at *Much-Waltham*, and ordered her to be ſent back thither; after which an order was made for ſettling the child at *Peram*, which *Comyns* moved to quaſh, becauſe, though regularly baſtards muſt be maintained where born; yet in this caſe, where there ſeems to be a contrivance, it ſhall not be ſo, as in *Tuming*'s caſe, 2 *Bul.* 349. Whenſoever an order is reverſed, all things happening ſubſequent thereunto, ſhall be avoided thereby: This child being born pending the order, ſhall be eſteemed in law to be born in that pariſh whereunto the mother on the appeal is returned back. The Court ſeemed to agree to this; and a rule was made to ſhew cauſe, but none was ſhewed.

der of removal from A. is ſettled in A. Vide 1 Salk. 121. Poſt. 485, 528, 532. 6 Mod. 213. Bulſt. 349. Carth. 397. 5 Mod. 204.

13. The Caſe of the Pariſh of Amner. [475]

[Mich. 8 Will. 3. B. R.]

THE caſe was, at the complaint of the churchwardens of *Terrent-Keinſton* in *Dorſetſhire*, to Sir *John Morton* and *John Gould*, two juſtices of the peace of the ſaid county, concerning a poor man and his wife; they the ſaid juſtices adjudged him to be laſt legally ſettled at *Tirrin-Crawford*, upon which they appealed; and there it was ordered, that it appearing to the ſeſſions that he was laſt ſettled at *Amner*, therefore they diſcharge *Tirrin-Crawford*, and order the poor man to be removed to *Amner*: This was quaſhed upon the motion of Mr. Serjeant *Gould*, becauſe this was to make an original order, which the juſtices at ſeſſions have no power to do; they might have reverſed the firſt order, and ordered the party to be carried back to *Terrent-Keinſton*, but they could not remove the party to *Amner*, a third pariſh, who was no ways concerned in the order or appeal; and if they are really chargeable with it, it muſt be at the complaint of *Terrent-Keinſton* to two juſtices of the peace.

Seſſions on appeal cannot ſend to a third place, not party. Poſt. pl. 20, 25, 32, 45, and 58. S.C. Set. and Rem. 268.

Comb. 286.

14. *Inter* the Inhabitants of the Pariſh of Chittinſton *and* Penhurſt.

[Mich. 8 Will. 3. B. R. *Vide ante. pl.* 9.]

AN order was made to remove a poor perſon from *Chittinſton* to *Penhurſt*, and this was quaſhed, becauſe it was not ſaid that one of the juſtices was of the *quorum*. *Holt*,

Authority given to juſtices of the peace muſt be exactly purſued.

Vide Farreſl. 99. Mod. Caſes 99. S. C. 5 Mod. 321. Set. and Rem. 271. Holt 507.

Holt, C. J. ſaid, that ſome indeed had been of opinion that an order was good, notwithſtanding this omiſſion, and perhaps it has been ſo adjudged; but he was of opinion, that this being a ſpecial authority to juſtices out of ſeſſions, it ought to appear that that authority was exactly purſued.

15. Dominus Rex *verſus* Matthews.

[Hill. 8 Will. 3. B. R.]

Upon motion to quaſh an order of baſtardy, the reputed father muſt be preſent in court. 6 Mod. 280. 1 Bl. Rep. 398.

MR. *Montague* moved to quaſh an order for maintaining a baſtard-child: 1ſt, Becauſe it was not ſaid the child was likely to become chargeable: And, 2dly, The defendant was ordered to pay 18 *d. per* week *indefinitely*, without limiting any certain time. *Shower* anſwered, that no order relating to a baſtard-child can be quaſhed, except the reputed father be preſent in court, *quod Curia conceſſit*: however this being a hard caſe, a rule was made to ſhew cauſe; and being ſtirred again the next term, the Court would not quaſh it till the reputed father came into court; and the firſt exception was over-ruled; for it is ſelf-evident that every baſtard-child is likely to become chargeable.

16. Purnall's *Caſe*.

[Hill. 8 Will. 3. B. R.]

Vide 5 Mod. 329. Ante, pl. 11. Poſt. pl. 34. S. C. Set. and Rem. 140.

AN order upon *H.* for maintaining his daughter, was quaſhed, becauſe it was recited to be made *ad generalem ſeſſionem pacis*, and not *ad quarterialem ſeſſionem pacis*, according to the ſtatute 43 *Eliz. c.* 2.

17. *Inter* The Inhabitants of Talbury *and* the Hamlet of Foſton in Scropton.

[Hill. 8 Will. 3. B. R. S. C. Foley, 123.]

Nothing will amount to notice in writing to make a ſettlement that is not ſpecified in 3 & 4 W. & M. c. 11. Ante, pl. 6. Comber. 382. 5 Mod. 454.

AN order was made by two juſtices of the peace in *Derbyſhire*, to remove *Robert Floud* to *Foſton* in the pariſh of *Scropton*. Upon appeal the firſt order was quaſhed, and the party ordered to be removed to *Talbury*, and the matter of fact being now ſtated ſpecially to the Court; the caſe was,

Floud was born in *Talbury*, and ſerved ſeven years apprenticeſhip there, which ended in the year 1693, ſince 1693 he lived in *Foſton* and other places out of the pariſh of *Talbury*,

bury, and the blackſmith that lived at *Foſton* dying, and the inhabitants wanting one, in 1694 *Floud* went thither, and rented the ſhop and a chamber of the widow of the former blackſmith for a year, at 52*s. per annum*, with the conſent of the bailiff of the lord of the manor: Here he worked publicly, was publicly employed by the pariſhioners, and particularly by the bailiff of the lord of the manor, the vicar, and the juſtice of peace; and now having never given notice, nor rented a tenement of 10*l. per annum*, or exerciſed any office, the queſtion was, Whether this public way of living was not *tantamount* and equivalent to notice in writing, which was only deſigned to prevent clandeſtine entries and livings. *Et pur Cur.*, This public notice taken by the pariſh might perhaps have ſatisfied the ſtatute 1 *Jac.* 2.; but there being doubts concerning the notice preſcribed by that act, the 3d and 4th *W. & M. c.* 11. was made to explain it, and this latter ſtatute hath particularized the notice, and what ſhall be *tantamount* to it, and what not (*a*); but this is not among the particulars of the ſtatute; for which reaſon the order was confirmed. Carth. 28.

(*a*) *R. acc.* 2 *Bott.* 3 ed. 124. *Foley* 110. *Str.* 835. *Poſt.* 534.

18. Hatton's *Caſe*. [477]

[Hill. 8 Will. 3. B. R.]

AN order was made by five juſtices to maintain a baſtard-child; and it was objected by *Broderick*, that the complaint is not ſaid to be by any pariſh or officers there, but only of a town which may include ſeveral pariſhes; but the Court held that well enough. 2dly, That the order is under the hands of five juſtices, whereas it ſhould be only the two next; but the Court held that well, for the ſtatute is not reſtrictive to two, but there muſt be two at leaſt. 3dly, That it does not appear that either of thoſe was a juſtice of *quorum*: upon this it was quaſhed, but the party was bound to appear at the next ſeſſions. Order of baſtardy under the hands of more than two juſtices, well. Poſt. pl 22. Mod. Caſes 180. S. C. Sett. and Rem. 272.

19. *Inter* Inhabitan. Cockfield *and* Boxſtead.

[Hill. 8 Will. 3. B. R.]

ANNE *Talby* was by order removed from *Cockfield* to *Boxſtead*; and this order being appealed from, was confirmed at the ſeſſions; but the ſeſſions after that made an order of review, and quaſhed the former order of ſeſſions, Seſſions. Comber. 418. S. C. Sett. and Rem. 177.

ſions, becauſe made by ſurpriſe. *Et per Cur*, The order of review muſt be quaſhed; for the juſtices have no power after the firſt ſeſſions.

20. Dominus Rex *verſus* Harding.

[8 Will. 3. B. R.]

Seſſions cannot refer a matter to be determined by another. Ante pl. 13. Poſt pl. 22. S. C. Sett. and Rem. 269.

A *Certiorari* was directed to the lord mayor and juſtices of peace of *London*, to remove an order, before filing whereof a *procedendo* was prayed: the fact was, the ſervant of one *Harding* complained to the ſeſſions, that her maſter was in arrear to her for wages: on hearing the matter, both parties agreed to refer it to Sir *Thomas Lane*, late lord Mayor, to be determined; which was done accordingly by order of ſeſſions: He made an award or order, but before report made thereof, this *certiorari* was now brought, whereon a *procedendo* was now prayed. *Et per Cur.* A judge of *niſi prius*, by conſent of parties, may make a rule to refer a cauſe, but the ſeſſions cannot do ſo, though by conſent (*a*): They may refer a thing to another to examine, and make report to them for their determination, but cannot refer a thing to be determined by the other; and therefore the *certiorari* was filed, and no *procedendo* granted.

(*a*) *Vide Stiles* 154. *Cald.* 30. 5 *T. R.* 279.

[478] 21. *Inter* The Inhabitants of the Pariſh of St. Mary le More *and* Heavy-Tree *in* Devonſhire.

Settlement by payment of pariſh rates. Vide poſt 523. pl. 1. and pag. 536. 1 Show. 12. Comb. 284, 410. Mod. Caſes 38.

FACY was ſettled at *Heavy-Tree*, and afterwards went into the pariſh of *St. Mary le More* in *Exeter*, and took a houſe there of one pound *per annum*, wherein he lived a year and a half, and paid the rates and taxes due for the ſaid houſe; and the juſtice at ſeſſions held, that the rate for a houſe, without a rate on his perſon, was not ſufficient to make a ſettlement (*a*); but the Court of King's Bench quaſhed this order for this cauſe, and held him ſettled at *St. Mary le More*.

(*a*) *Vide* 8 *Mod.* 38, *Bur. S. C.* 465. 73, 522, 627. *Cald.* 103, 276, 365. 2 *Conſt.* 233, *Per* Lord *Manſfield*, in *Rex* v. *St. Laurence*, *Cald.* 379. The occupier muſt be preſumed to be rated, againſt whom the firſt remedy lies, as between him and the public. *Per Cur.* *Rex* v. *Rainham*, 5 *T. R.* 240. The ſeſſions muſt decide the fact, whether the rate is upon the landlord or the tenant.

22. Dominus Rex *verſus* Beard.

AN order made by two juſtices of the peace in *Suſſex*, adjudged *Beard* to be the father of a baſtard-child, which was quaſhed, becauſe it appeared thereby, that the examination of the woman was by one juſtice only, though the ordering part thereof was ſaid to be made by both (*a*); and *Beard* was bound over to the next ſeſſions.

Order of baſtardy ill, becauſe examination by one juſtice only. Ante pl. 8, 10, 18. Poſt pl. 50. Poſt. pl. 34.

(*a*) *R. acc.* 6 *Mod.* 180. *Vide* 2 *Bl. Rep.* 1017. *And.* 238.

23. *Inter* Inhabitan. St. Giles Cripplegate *and* Hackney.

[Paſch. 9 Will. 3. B. R.]

WHEREAS complaint has been made to us, that *Elizabeth Fulford*, wife of *Uriel Fulford*, is lately come into the pariſh of *St. Giles Cripplegate*, and is likely to become chargeable to the ſame; and whereas, on oath made by the ſaid *Eliz. Fulford*, it appears that her huſband was laſt legally ſettled at *Hackney*; theſe are therefore, *&c.* Quaſhed, becauſe there is no judgment of the juſtices concerning the laſt legal ſettlement, but only the oath of the woman.

Place of laſt legal ſettlement muſt be adjudged. Vide ante pl. 7. poſt pl. 26. and poſt pag. 491, &c. ib. Comb. 413. Doug. 662. (637.) Str. 73.

24. Dominus Rex *verſus* Barebaker.

[Paſch. 9 Will. 3. B. R.]

ORDER upon *H.* adjudging him to be the father of a baſtard-child, and ordering him to pay 3 *s. per* week till the child attain the age of fourteen years, was held naught; for they have no authority but to indemnify the pariſh, by obliging him to maintain the child as long as it ſhall be chargeable to the pariſh (*a*).

To maintain his baſtard till the age of fourteen, ill. 1 Mod. 20. 1 Vent. 210. 2 Keb. 23. Comb. 320, 321. S. C. Ante 121. Black. 234. Set and Rem. 145.

(*a*) *R.* That order to pay till nine years old is good, 2 *Str.* 788.

25. Anonymous. [479]

[Paſch. 9 Will. 3. B. R.]

AN order made by two juſtices of the peace for ſettling a poor perſon, was quaſhed by the ſeſſions; but becauſe it did not appear that it came before them by way of

Where the ſeſſions quaſh an order, it muſt appear to be on

appeal. Ante pl. 13, 20. S. C. by the name of Jerriſon's Caſe, Comb. 445. Set. and Rem. 176. Skin. 671. 5 Mod. 328. Caſes B. R. 132.

of appeal, without which they have no juriſdiction, this order of ſeſſions was quaſhed (*a*).

(*a*) *Vide Comb.* 133. *Bur. S. C.* 276.

26. *Inter* The Inhabitants of Berry *and* Arundel.

[Paſ. 9 Will. 3. B. R.]

Want of adjudication of laſt legal ſettlement. Poſt. 491, &c. Ib. & ante pl. 7. 5 Mod. 325, 397. Comb. 413. S. C. Set. and Rem. 257. Doug. 662. (637). Str. 73.

WHEREAS complaint hath been made to us, that *Jacob Duckin* with his wife and children, came from his place of abode and laſt legal ſettlement in *Berry* to *Arundel*; we therefore require you, &c. naught; for there is no adjudication of the juſtices, which was his laſt legal ſettlement, but only a complaint, that *Berry* was, which doth not appear, whether true or falſe.

27. Elizabeth Aſhley's *Caſe*.

[Trin. 9 Will. 3. B. R.]

Return by the clerk of the peace, ill. Vide Pa. 431, 699, 701. S. C. 3 Salk. 258. Caſes B. R. 138. Set. and Rem. 259.

TWO orders were removed by *certiorari*, but the return was quaſhed; becauſe the return in the ſchedule annexed to the writ was not made by two juſtices, but by the clerk of the peace, who was not the perſon to whom the *certiorari* was directed, and thereupon a new *certiorari* was granted.

28. The Caſe of Cheſterfield.

[Trin. 9 Will. 3. B. R.]

Covenant between the maſter and third perſon, the ſervant not being party, makes no apprenticeſhip. Poſt. 533. S. C. Skin. 671. 5 Mod. 308. Carth. 400. Comb. 445. Caſes Br. 132. Vide Cald. 31.

JERRISON was a ſervant to Sir *Paul Jenkinſon* in *Waltham*; afterwards he left his ſervice and was put out, by his maſter Sir *Paul Jenkinſon*, to a barber in *Cheſterfield*, who was to teach him to ſhave and make periwigs, for which he was to have 5 *l.* from Sir *Paul*. *Jerriſon* continued a year in this employment, according to covenants between Sir *Paul* and the barber, to which *Jerriſon* was no party; and the Court adjudged that this did not make a ſettlement at *Cheſterfield*, becauſe it was no ſervice; and that the ſaid *Jerriſon* was thereby no more than a boarder there for his education, which is no ſervice to make a ſettlement.

29. Dominus Rex *verſus* Brown.

[Trin. 9 Will. 3. B. R.]

AN order was made, adjudging *Brown* to be the father of a baſtard-child, *May* 2, 1696: And in the *Michaelmas* ſeſſions following the ſaid order was diſcharged. Now both orders being here, the latter was quaſhed, becauſe it did [*not*] appear thereupon, that *Michaelmas* ſeſſions was the firſt ſeſſions after notice given to the reputed father of his being ſo adjudged; for though 18 *Eliz.* appoints the appeal not to be to the firſt ſeſſions after the order of the two juſtices, but the firſt [*general*] ſeſſions after the party hath notice of the ſaid order; yet by the ſtatute of *H.* 5. there might be a ſeſſions intervening, as in this caſe, between the order by the two juſtices and the order of ſeſſions; and it muſt appear on the order that this was the firſt [*general*] ſeſſions after notice had of the former order: After which the firſt order by the two juſtices was quaſhed, becauſe there was an adjudication therein, that the reputed father ſhould pay a certain ſum weekly, till the child be of ſeven years of age; whereas they cannot charge the father for any certain determinate time, but as long as the child ſhall be chargeable to the pariſh.

Appeal from order of baſtardy muſt be to the firſt ſeſſions after notice to the father, of the firſt order. Ante, pl. 11, 16. Poſt. pl. 34. Comb. 448. S. C.

2 H. 5. c. 4.

30. Elizabeth Aſhley's *Caſe*.

[Trin. 9 Will. 3. B. R.]

EXCEPTION was taken to an order of two juſtices, to remove, *&c.*, becauſe it was not ſaid that the two juſtices were of the diviſion, according to 13 & 14 *Car.* 2. *Sed non allocatur*; for the Court held the ſtatute as to this to be only *directory*, and not *reſtrictive* or *qualificatory*, as that of the *quorum* is.

Juſtices need not be ſaid to be of the diviſion. Ante, pl. 8 Comb. 285, 400. 5 Mod. 322.

31. *Inter* The Inhabitants of Dimchurch *and* Eaſtchurch.

[Hill. 9 Will. 3. B. R.]

AN order was made at the quarter-ſeſſions originally, ſetting forth, That whereas the pariſh of *Dimchurch* was overburdened with poor, and the pariſh of *Eaſtchurch* had no poor, the pariſh of *Dimchurch* ſhould be annexed to the pariſh of *Eaſtchurch*, and that the occupiers of lands there

Order for making one pariſh contributory to the poor of another. Comb. 242, 309. S. C.

Set. and Rem. 221. Holt 573. 4 T. R. 778. 1 Str. 56. 2 Str. 1144. Comb. 309.

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Skin. 258, 259.

5 Mod. 397.

there ſhould contribute 20 *l. per annum*, by equal monthly payments to *Dimchurch*, as long as that was overburdened with poor, and *Eaſtchurch* had none: And it was objected by Mr. *Brewer*, that the juſtices of peace cannot alter pariſhes and annex one to another. 2dly, That the ſeſſions cannot make an original order (*a*). *Per Holt*, C. J. There are two ways by 43 *Eliz.* to make one pariſh contributory to the poor of another pariſh, *viz.* either the juſtices may tax particular perſons in aid to that pariſh which cannot relieve its own poor; or they may aſſeſs the whole pariſh in a certain ſum, and leave it to the churchwardens and overſeers to levy the ſame, or particular perſons, which was well done in this particular caſe; but ſo much of it as concerns the annexing of the pariſhes is void, and the reſt good. But the Court took time to adviſe.

(*a*) This was ruled, *Comb.* 25. 5 *Mod.* 397. *Foley* 32.

32. *Inter* Inhabitan. Paroch. Downhead *and* Broadchalk *in* Wilts.

[Hill. 9 Will. 3. B. R.]

After order confirmed on appeal, if the perſon goes to a pariſh not party, he muſt be removed by original order. Vide ante, pl. 23, 20, 25.

TWO juſtices of the peace made an order to remove *John Rainsford*, his wife and three children, from *Rowborough* in *Somerſetſhire*, to *Broadchalk* in *Wilts*, which order, on an appeal to the quarter-ſeſſions, was confirmed; after this *Rainsford*, with his wife and three children, came into the pariſh of *Downhead*; whereupon two juſtices, reciting the former order and confirmation, ordered him to *Broadchalk*: And now it was objected to this order, that it did not appear that one of the juſtices was of the *quorum*. Mr. *Northey* on the other ſide argued, it was not neceſſary here, becauſe it was not an original order, but an order made in purſuance of an order of ſeſſions. *Et per Cur.* A ſettlement, by order upon appeal, binds all parties: If the poor man goes to the pariſh from whence he is removed, the ſeſſions muſt ſee their order obeyed; but if he goes to another pariſh not concerned in the appeal, then it is proper for two juſtices of the peace to remove him to the pariſh where he was ſettled by the ſeſſions by original order; but then it muſt appear therein that one of them was of the *quorum* (*b*). Quaſhed.

(*b*) By ſtat. 26 *G.* 2. *c.* 27., this is no ground for reverſing an order.

33. *Inter* Inhabitan. King's Norton in Wigorn *and* Swolhill *in* Warwic'.

[Hill. 9 Will. 3. B. R.]

Order of two juſtices binds againſt all pariſhes, till repealed. Vide poſt. pl. 49 & 52. 5 Mod. 416.

AN order was made to remove a poor woman from *Yarly* in *Worceſterſhire*, to *Swolhill* in *Warwickſhire*; afterwards two juſtices in *Warwickſhire* made an order to remove her to *King's Norton* in *Worceſterſhire*; whereupon two juſtices of *Worceſterſhire* ſent her back to *Swolhill*; and upon an appeal to the ſeſſions in *Warwickſhire*, the juſtices confirmed her ſettlement at *King's Norton*, and then an order was made by two juſtices of the peace to execute the ſaid order: All theſe orders being brought up by *certiorari*, *Cartheew* moved to quaſh all except the firſt, all the others being made *coram non judice*; for when an original order is made, it binds all perſons until it be ſet aſide, and it cannot be ſet aſide but on appeal to the ſeſſions. Mr. *Northey*, on the other hand, inſiſted, that though in this caſe two juſtices could not ſend the woman back again to *Yarley*, yet they might ſend her back to a third place, as *King's Norton* is in this caſe; ſo that as to *King's Norton* it is but an original order; but the Court ſeemed to be of another opinion, for then *King's Norton* might ſend to *Yarley*, and there would be a perpetual circuity; but ſeeing in this caſe *King's Norton* had appeared at the ſeſſions, and had been concluded there, they would not quaſh the order; and ſeveral other queſtions ariſing, all was referred to a judge of aſſize.

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34. Dominus Rex *verſus* Shaw.

[Trin. 10 Will. 3. B. R.]

Appeal from order of baſtardy muſt be to the general ſeſſions. Ante, Pl. 11, 16, & 29, & poſt. pl. 38. S. C. Carth. 455. Set. and Rem. 135. Caſes B. R. 203.

AN order was made by two juſtices of the peace, adjudging *Shaw* to be the reputed father of a baſtard; whereupon he appealed to the next quarter-ſeſſions of the peace, after notice, where the order of the two juſtices was diſcharged; and now it was here moved to quaſh the order of ſeſſions, becauſe by the ſtatute the appeal muſt be to the next general ſeſſions, and there might have been a general ſeſſions before the general quarter-ſeſſions, as in *London* and *Middleſex*, where there are four general ſeſſions in a year, beſides the general quarter-ſeſſions (*a*). Quaſhed for this fault.

(*a*) *R. cont.* 3 *T. R.* 496.; and ſaid *per Curiam*, that this caſe does not appear to be one of the moſt accurate in *Salk. Reports.*

35. Anonymous.

[Mich. 10 Will. 3. B. R.]

Order to remove A. and his family, ill for generalty. Poſt. pl. 41. Farefl. 54. Comber. 478, 479. Poſt. 528.

AN order made to remove three men and their families was quaſhed, *quia* too general; for ſome of their family might not be removeable. If a man ſettled at *A.* marries a poor woman who is ſettled at *B.*, and has children by a former huſband; his wife ſhall be removed with him to *A.*, but her children, ſuch of them as are above ſeven years old, ſhall not be removed; thoſe under ſhall be removed, but that only for nurture; for they ſhall be kept at the charge of the other pariſh: But ſuch a general order ſweeps all away.

Vide Str. 114. Foley 278.

36. Anonymous.

[Mich. 10 Will. 3. B. R.]

Firſt order failing, all ſubſequent fall to the ground.

PER Northey, it was ſettled in the caſe of *Wooton-Baſſet*, that if the firſt order be naught, no ſubſequent order on an appeal can make it good. *Hill.* 11 *W.* 3. *B. R.* Same rule was taken by *Holt*, C. J. and both orders quaſhed; and *Trin.* 2 *Ann.* the ſame reſolution between *Selon* and *Ripley*.

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37. The Caſe of the Pariſh of St. Leonard Shoreditch.

[Mich. 10 Will. 3. B. R.]

On appeal from a poor's rate the ſeſſions may quaſh the whole, and make, or other churchwardens, &c. to make a new rate. Vide ante 4-2. Farefly 10. Set. and Rem. 236. S. C. Holt 508. Carth. 464. Caſes B. R. 211.

THE churchwardens, *&c.* made a rate for relief of the poor, which was confirmed by two juſtices, and therein nothing was taxed for the perſonal eſtate, but all upon the real, which was erroneous. Several inhabitants appealed to the ſeſſions, and the rate was there quaſhed; and the churchwardens, *&c.* ordered to make a new rate, upon both real and perſonal eſtates: In the new rate there was ſtill a great inequality, the real eſtate being taxed ten times more, in proportion, than the perſonal eſtate; for this reaſon ſeveral inhabitants appealed again, and this rate was likewiſe vacated by order of the ſeſſions. And now *Northey* and *Skower* moved to quaſh theſe orders, urging, that the ſeſſions could only relieve particular perſons over-rated or grieved, but could not ſet aſide whole rates at once. *Sed per tot. Cur. viz. Holt*, *Rokeby*, and *Turton*: Surely the juſtices at ſeſſions, upon an appeal of particular

Carth. 58.

Vide 4 Bur. 1460. 5 Bur. 2634. Cowp.

particular perſons grieved may, if they ſee cauſe, ſet aſide the rate; for the act is, that if any perſon or perſons find themſelves aggrieved, it ſhall be lawful for the juſtices at the quarter-ſeſſions to take ſuch order therein, as by them ſhall be thought convenient. 43 *Eliz. c.* 2. *ſect.* 6. And in either of theſe caſes, of the firſt or ſecond rate, the juſtices could not have given relief without ſetting aſide the whole rate, becauſe the rate was burthenſome to a whole ſet of men; and they may make a new rate themſelves (*a*), or order the churchwardens and overſeers to make a new rate, as was done in this caſe; they having it in their diſcretion to make a new rate at ſeſſions, or remand it to the churchwardens, *&c.* to make one. The orders were confirmed (*b*).

43 *Eliz. c.* 2. *ſect.* 6. St. 17 G. 2. c. 38.

If ſeſſions ſet aſide a whole rate, they may make new one;

Or refer it back to the churchwardens, &c.

(*a*) The ſeſſions cannot make an original rate, *Rex* v. *Aberford Eaſt*, 2 Ld. *Raym.* 798.

(*b*) Where an objection is againſt the general rule and proportion of the rate, the ſeſſions, upon deciding in favour of the objection, ſhould quaſh the rate, *Rex* v. *Sandwich*, *Doug.* 562. *Cald.* 105. Where the ſeſſions hold a rate bad, becauſe particular perſons are not inſerted, they muſt quaſh the rate, and cannot amend it, *Rex* v. *Maddem*, 1 *T. R.* 625. *Rex* v. *St. Agnes*, 3 *T. R.* 480. Where an appellant is overcharged, the ſeſſions may relieve him by leſſening his rate. *Rex* v. *Cheſhunt*, 2 *T. R.* 623.

38. Dominus Rex *verſus* Albertſon.

S. C. Carth. 469. Holt 507. Set. and Rem. 136.

[Mich. 10 Will. 3. B. R. 1 Ld. Raym. 395. S. C.]

AN order was made, reciting, Whereas it appears to us, two juſtices of the peace, that *Mary Spencer*, wife of *Jonathan Spencer*, mariner, was on the 20th of *March* 1695 delivered of a male baſtard-child, which is likely to be chargeable, *&c.* And whereas it appears to us, that the ſaid *Jonathan Spencer* was employed on board the ſhip called the *Pembroke*, in his majeſty's ſervice at *Cadiz*, and was not within the king's dominions when the ſaid child was begotten, or born; and whereas it appears that *Albertſon* had carnal knowlege of the body of the ſaid woman, during the abſence of her huſband, and that he begat the ſaid child; we therefore adjudge him to be the reputed father, and to pay weekly, *&c.* And the ſaid order being confirmed upon appeal, was brought here by *certiorari*. And now *Shower* and *Upton* moved to quaſh theſe orders, becauſe 18 *Eliz. c.* 3. gives the juſtices power only to meddle with baſtards born *out of lawful matrimony*; ſo that though this child ſhould be a baſtard, yet the juſtices cannot meddle with it, becauſe he is born *in lawful matrimony*: But it does not appear in this order that this child was a baſtard; for it is only ſaid the father was abſent when the

Child born of a feme covert, the huſband being at ſea, from before the time of begetting to the birth, is a baſtard; but that muſt appear in order. Vide ante, pl. 11, 16, 29, 34, &c. 5 Mod. 419.

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child was begotten or born, in the disjunctive; alſo it doth not appear but the huſband was in *England* during the time intermediate between the begetting and birth. *Per Cur'*, He is a baſtard who is born of a man's wife while the huſband, at and from the time of the begetting to the birth, is *extra quatuor maria*: In caſe of real action by him, the tenant may plead general baſtardy; and on a writ to the biſhop, he will certify him to be a baſtard; being then a baſtard as to diſcent, there is no reaſon why he ſhould not be a baſtard as to all other intents, and in particular a baſtard within 18 *Eliz.* which is a remedial act: Alſo when a child is born in adultery, he is born out of the limits of *lawful matrimony*, the law then taking no notice of the huſband; and ſo, though we muſt quaſh this order, becauſe it does not appear that the huſband was *extra quatuor maria*, during all the ſpace of time intervening between the begetting and the birth, yet we hope care will be taken to make a new order without this fault (*a*). Quaſhed. But the defendant was bound over to appear at the ſeſſions.

(*a*) Non-acceſs may be proved, though both huſband and wife are *infra quatuor maria*, *Str.* 925.; and an order of filiation made thereupon, *Str.* 1076. And it is not neceſſary that non-acceſs ſhould be proved by poſitive teſtimony, but it may be collected from circumſtances. 4 *T. R.* 356.

39. The Caſe of The Churchwardens of Topſham.

[Hill. 10 Will. 3. B. R.]

Juſtices may make an order, that the laſt overſeers pay the ſucceeding what remains in their hands. Vide poſt. 524, 525, 531, 533.

THREE juſtices took the account of the churchwardens, *&c.* of *Topſham*, for the year 1697, and adjudged that there was thereupon due from them to the pariſhioners of *Topſham*, 69*l.* 18*s.* 10*d.*, for the repayment whereof to the ſucceeding overſeers for the year 1698, the juſtices made an order; to which it was excepted, that the juſtices had no power to make ſuch order, but only to iſſue warrants to diſtrain; but the Court ruled the order to be well made, and confirmed the ſame.

40. Dominus Rex *verſus* Gregory.

Wages. 5 Mod. 419. Set. and Rem. 232. S.C.

AN order was made by the juſtices of peace for the defendant to pay 40*s.* for wages generally; and becauſe it was not ſaid for what wages, it was moved to quaſh it; for they can only ſettle wages in huſbandry: But *per Cur.*, We will intend it for ſuch wages, ſince the contrary does not appear.

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Vide ante 442. pl. 5. 3 T. R. 496. Str. 8.

41. The Caſe of Sylvanus Johnſon.

THE juſtices of *Suſſex*, on complaint that *J.* was come into the pariſh of *Brood*, in the ſaid county, and was likely to become chargeable to the ſaid pariſh, and adjudging *Sandherſt* in *Kent* to be his laſt legal ſettlement, ordered that *Johnſon*, and his wife and family, ſhould be removed to *Sandherſt*; which was quaſhed; becauſe *non conſtat* what is meant by his family, and ſome of them may have a legal ſettlement at *Brood*, though *J.* had not.

To remove his wife and family, ill. Ante, pl. 35. Vi. Far. 74. Comb. 478. Caſes B. R. 553. S. C.

Str. 114. Foley 278.

42. Chriſt's Hoſpital's *Caſe*.

[Trin. 11 W. 3. B. R.]

A Poor child was left in *Chriſt's Church Hoſpital*; upon complaint of the wardens of the hoſpital, two juſtices made an order on the overſeers of the poor of the pariſh, to receive and maintain the child; but this order was quaſhed, becauſe it was not ſaid, that the parents were unknown, or likely to become chargeable to the pariſh: For though a child of three months old be helpleſs, yet the parents are bound to provide for it. As to the principal matter which was hinted, *viz.* That the hoſpital was bound to provide for poor children there expoſed, the Court thought there was nothing in that.

Poor children dropped in Chriſt Church Hoſpital. Set. and Rem. 53. S. C.

43. *Inter* The Inhabitants of St. Nicholas, Guilford *in* Surrey, *and* Killington *in* Suſſex.

[Trin. 11 Will. 3. B. R.]

NORTHEY moved to quaſh an order of two juſtices to remove a woman and her baſtard-child from *A.* to *B.*, whereas it appeared in the order that the child was born at *C. Holt*, C. J. The baſtard muſt be kept where it is born (*a*).

Baſtard ſettled where born. Vide ante 427, 482. Poſt. 528, 532. Holt 509. S. C.

(*a*) Though baſtards are ſettled where born, they muſt be removed with or to the mother for nurture, while under ſeven years old, 2 *Seſſ. Caſ.* 89. And an order may be made on the pariſh where they are ſettled, to pay money for their ſupport and maintenance to that where they reſide for nuture, *Cald.* 6. *Vide Doug.* 9.

44. *Inter* The Inhabitants of the Precinct of Bridewell *and* The Pariſh of Clerkenwell.

[Hill. 11 Will. 3. B. R.]

Carth. 515. S. C. Holt 575, 509. Juſtices have no juriſdiction to remove poor perſons to or from extraparochial places. But note; In the caſe of The Inhabitants of Stokeiane and Dolting, Hill. 11 Ann. B. R. it was adjudged by Parker, C. J. and the whole Court, that by virtue of 13 & 14 Car. 2. cap. 12. ſect. 21. the juſtices may exerciſe the powers given by 43 El. and that act, in all extraparochial places, containing more houſes than one, ſo as to come under the denomination of a vill or townſhip. Poſt. pl. 48. Vide poſt. 487, 501. 2 Lev. 142, 143. 4 Mod. 157, 158. 1 Mod. 251. 2 Mod. 237.

A Special order of ſeſſions was, That *H.* was bound apprentice, and ſerved ſeven years to a hemp-dreſſer, within the precincts of *Bridewell*, and afterwards he lived nine years in *Clerkenwell* pariſh, but gained no ſettlement there: The juſtices ſent him to *Bridewell* as his laſt legal ſettlement, by an order which ſet forth *Bridewell* to be an extraparochial place. *Et per Holt*, C. J. If a place is extraparochial, and has not the face of a pariſh, the juſtices have no authority to ſend any man thither; and ſo it was reſolved in the caſe of Sir *John Oſborn*: Poſſibly a place extraparochial may be taxed in aid of a pariſh, but a pariſh ſhall not in aid of that. This is *caſus omiſſus*. This order was quaſhed.

45. *Inter* The Inhabitants of St. Michael Bedenham *and* Kingſton-Bowſey.

[Hill. 11 Will. 3. B. R.]

Order of reverſal on appeal binds not a third pariſh, not party. Poſt. pl. 58. & pag. 524, 527. Ante, pl. 11, 13, 20, 25. Carth. 516. S. C. Set. and Rem. 275.

H. Was ſent by order of two juſtices from *St. Michael Bedenham* to *Kingſton-Bowſey*, and that order was reverſed upon an appeal to the ſeſſions: Then the man went to *Bedenham*, and *Bedenham* ſent him to *D.*; and a motion was made to quaſh this order, becauſe the order of reverſal upon the appeal as to *Kingſton-Bowſey* was concluſive againſt all the world. But the Court held, That the determination upon the appeal between other parties ought not to bind as to a third pariſh which was no party (*a*).

(*a*) *Vide acc. Bur. S. C.* 17, 425.

46. Anonymous.

[Hill. 11 W. 3. B. R.]

Special order ought not to conclude to the opinion of the Court.

AN order of ſeſſions drawn up ſpecially, in order to have the opinion of the Court, was concluded; *and if the Court ſhould be of opinion, then, &c.* which was held naught;

naught; for the juſtices ought to determine one way or other, and not make a ſpecial concluſion, referring to the Court; but it was referred to the judge of aſſize.

47. *Inter* Inhabitan. Paroch. Eaton-Bridge *and* Inhabitan. Paroch. Weſtram *in* Kanc. [487]

[Hill. 11 W. 3. B. R.]

Poor priſoners.

AN order was made at the quarter-ſeſſions for the relief of poor priſoners in gaols, and providing materials to ſet them at work, upon the ſtatutes of 14 *Eliz.* *c.* 5. and 19 *Car.* 2. *c.* 4., whereby a ſum was aſſeſſed on the ſeveral pariſhes, not exceeding what is allowed by both acts; but the order was quaſhed, becauſe they ought to have made diſtinct orders upon the different ſtatutes, the money to be levied by virtue of each ſtatute being applicable to different purpoſes (*a*).

(*a*) The ſtat. of *Eliz.* is the general act for parochial relief. The ſtat. of *Cha.* is for the relief of perſons in gaol, by a charge on the county.

48. *Inter* The Inhabitants of the Foreſt of Dean *and* The Pariſh of Linton.

[Trin. 12 W. 3. B. R. S. C. Foley 97.]

Extraparochial places. Vide ante, pl. 44. Holt 575. S. C.

HLived ten years in the foreſt of *Dean*, and then died, and left ſeveral children: Two juſtices made an order to remove them to *Linton* in *Herefordſhire*. *Et per Holt*, C. J. If a place be a reputed pariſh, and have churchwardens and overſeers of the poor, it is within 43 *Eliz.* though in truth it be no pariſh; but if it be merely extraparochial, as the juſtices cannot ſend to ſuch a place, ſo they cannot ſend from it: As it is exempt from receiving, ſo it ſhall not have the benefit of removing, for they have not proper perſons to complain. Perſons in extraparochial places muſt ſubſiſt on private charity, as all perſons did at common law before 43 *Eliz.* which enacts, That every pariſh ſhall keep their own poor; in conſequence of which the juriſdiction of removals was firſt ſet up before the ſtatute 14 *Car.* 2. For, unleſs the poor were removed to their own pariſhes, every pariſh could not maintain their own poor. But the ſtatute of 43 *Eliz.* does not extend to extraparochial places. *Gould*, J. ſtarted a queſtion, If the juſtices of the county, where the pariſh wherein he was laſt legally ſettled lies, might not make an order

order upon the pariſh to make a rate for the relief of this poor man in the extraparochial place, becauſe not having gained a ſettlement there, he remains an inhabitant of that pariſh ſtill, elſe the man may be ſtarved for want of relief? *Holt*, C. J. Quaſh this order, and then go and get an order: Foraſmuch as *H.* was ſettled in the pariſh of *Linton*, and is not able to provide for himſelf: Theſe are, *&c.*

[488] 49. *Inter* The Inhabitants of Chalbury *and* Chipping-Farringdon.

[Trin. 12 Will. 3. B. R.]

Pariſh, upon whom an orignal order is made, cannot remove till that be reverſed. Vide ante, pl. 31. Poſt. pl. 52. Holt 509. S. C.

H. Was removed by order of two juſtices, from the pariſh of *A.* in *Warwickſhire*, to *Chalbury* in *Oxforſhire*; from thence, by order of two juſtices, to *Chipping-Farringdon* in *Berkſhire*. It was objected, That *Chalbury* ought to have appealed, and got the order upon them diſcharged, which *Holt*, C. J. agreed; for ſending the poor man to another place, is falſifying the firſt order, which cannot be done but by appeal; for the order of two juſtices is a determination of the right againſt all perſons, till it be reverſed: *Chalbury* ſhould have appealed from the *Warwickſhire* order, and got that ſet aſide, and ſent the man back thither, and the juſtices there ſhould have ſent him to *Chipping-Farringdon*; therefore naught.

50. *Inter* The Inhabitants of Ware *and* Stanſtead-Mount-Fitchet.

[Trin. 12 Will. 3. B. R.]

AN order was made by two juſtices, to remove *H.* with his wife and children, from *Ware* in the county of *Eſſex* to *Stanſtead* in the ſame county. Exception was taken to this by Mr. *Eyre*, 1ſt, Becauſe it was, with wife and children. 2dly, Becauſe it was ſaid, *It appears upon examination before us, or one of* us, *&c.*; and the examination ought to be before both, becauſe both are to make the judgment of removal. Mr. *Cowper* would have diſtinguiſhed this as the firſt exception from the caſe of *Mich.* 10 *Will.* 3. *ante*, *pl.* 35, 41. Of his wife and family, becauſe he might have ſervants not removeable, but children ought to follow their parents. To the ſecond he ſaid, That by 14 *Car.* 2. *c.* 12. the complaint is directed to be made to any juſtice, and in conſequence one juſtice may examine;

Examination muſt be by both juſtices. See 6 Mod. 180.

examine; and it was only neceſſary that two ſhould join in removing: *Sed Cur. contra* in both. To the firſt *Holt*, C. J. ſaid, Suppoſe *H.* had put his ſon out to ſervice at ſixteen years old at *B.*, and accordingly he had ſerved there a year, and after the father comes to live at *B.* himſelf, and the ſon to live with him; ſuch an order would remove the ſon, though he be not removeable. To the ſecond, *Gould*, J. ſaid, The ſtatute directed, and the practice was, to make complaint to one juſtice, and he grants his warrant to bring the poor man before two juſtices, and then they two examine and remove (*a*). Fareſt. 54. Ante, pl. 22.

(*a*) *Vide* 2 *Str.* 1092. *Bur. S. C.* 136. 2 *Bott*, 3d edit. 769. 3 *T. R.* 707.

51. Dominus Rex *verſus* The Inhabitants of Long-Critchell. [489]

[Mich. 12 Will. 3. B. R.]

A Man was removed from the pariſh of *Allhallows* to the pariſh of *Long-Critchell*. He goes from *Long-Critchell* to *P.*; they got ſeveral orders from two juſtices, by way of execution of the firſt order, to remove him *P.* to *L.* But all of them were quaſhed, becauſe *P.* ought to have made an original complaint, and upon that have got an order, and not have graſted on the order of removal from *A.* to *L.*, though they might have uſed that as evidence to induce the juſtices to make ſuch original order; for *P.* is a third pariſh, againſt which *L.* is not (*b*) bound by the order of removal from *A.* to *L.*, but may conteſt the right of ſettlement with them. Mr. *Upton* took an exception, that the enforcing orders did not appear to made by two juſtices, *quorum unus*: And *Holt*, C. J. ſeemed to think that a good exception, becauſe ſuch perſons as cannot make an order, cannot execute it: But the orders were quaſhed upon the firſt reaſon. Order of execution, Caſes B. R. 419. S. C. Holt 510. See 5 Mod. 321. 322. Ante 473. 480, 488. Ante 436. pl. 18. & Poſt. pl. 60.

(*b*) The contrary is clearly law, as is held in the next ſucceeding caſe. It was acknowleged, 3 *Bur.* 551., as a ſettled point, that an order of removal to a pariſh confirmed, or without appeal, concludes that pariſh againſt all the world. The ſame is held, 2 *T. R.* 598.; but the deciſion in this caſe may be, and *(cæme ſemble)* is good; though the reaſon to which this annotation is applied is falſe.

52. *Inter* The Inhabitants of Thackham *and* Findon *in* Suſſex.

[Hill. 12 Will. 3. B. R.]

Two juſtices order not appealed from binds the whole pariſh upon which it is made, till a new ſettlement is gained. Vide ante, pl. 33 & 49.

A Poor perſon was removed in 1694 from *Weſt-Starring* to *Findon*; *Findon* does not appeal. In 1700 the man comes to *Thackham*, and *Thackham* ſends him by order of two juſtices to *Findon*; *Findon* appeals, and the order was diſcharged. All three being now brought up by *certiorari*, it was moved to quaſh the order made upon appeal, and urged that *Findon* was bound by the firſt order from *Weſt-Starring* to them, from which they never appealed, with reſpect to all the world, and are concluded to ſay, that the place of his laſt legal ſettlement was not with them: But in reſpect of the diſtance of time, the Court could not tell but he might have gained a new ſettlement at *Thackham*, and that might appear to the juſtices, and they might have good ground to diſcharge the order of the two juſtices. Then the counſel offered to produce an affidavit, that there was no new ſettlement proved; that the Court held that they could not examine that by affidavit, nor inquire thereby into the reaſon of making the order (*a*). *Ex motione* Mr. *Shelly*.

Vide note to preceding caſe.

(*a*) *Vide* 2 *Batt*, 3d edit. 860. 2 *Bur. S. C.* 394.

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Vide Poſt 491. 1 Salk. 67, 68.

53. Ditton's *Caſe*.

[Paſch. 13 Will. 3. B. R.]

Order for diſcharging an apprentice, the maſter not appearing. Vide Farel. 55. 1 Mod. 2. 5 Mod. 139, 140. Rep. B. R. Temp. Hard. 101.

MOVED to quaſh an order made for the diſcharge of an apprentice: The queſtion aroſe upon the clauſe of the ſtatute, which directs, That upon the appearance of the maſter the apprentice may be diſcharged by four juſtices, after the next juſtice hath endeavoured to compoſe the matter in difference. In this caſe it was objected, that *Ditton* the maſter was bound over to appear, and did not; and the juſtices have but a limited juriſdiction; and it is expreſsly directed by the act, that this diſcharge is to be made on the appearance of the maſter; beſides, there is another remedy to proceed on the recognizance, which is forfeited by not appearing.

Per Cur. The act muſt have a reaſonable conſtruction, ſo as not to permit the maſter to take the advantage of his own obſtinacy; and it would be very hard, that ſuppoſing the maſter is profligate and runs away, the apprentice ſhall never be diſcharged. Afterwards exception was taken, becauſe

becauſe it appeared upon the face of the order, that *Ditton* was a collar-maker, & *non conſtat* what the trade is, nor that it is within the ſtatute; like *Comfort*'s caſe, where one was bound to a mantua-maker, when there is was no ſuch trade within the ſtatute, nor at the time of the ſtatute (*a*): And in this caſe it was ſaid, that the juſtices might make the maſter make reſtitution of part of the money, and that it hath been ſo adjudged.

Ante 67, 471.

1 Saund. 313, &c. Poſt. 491. Skin. 108.

(*a*) This is now clearly immaterial, *Str.* 663. 1 *Bott*, 3d ed. 515.

54. *Inter* The Inhabitants of Watford *and* Wendover.

[Paſch. 13 Will. 3. B. R.]

TWO juſtices of St. *Albans* made an order, that whereas they were credibly informed, that *Wendover* was the place of *H.*'s laſt legal ſettlement, but no where adjudged it to be ſo; from this order there was an appeal to the quarter-ſeſſions of St. *Albans*, where it was confirmed; and both were quaſhed; the firſt, becauſe there was no adjudication of what was the place of his laſt legal ſettlement; and the ſecond, becauſe the appeal ought to have been to the ſeſſions of the county, not of the corporation; and as it was, it was *coram non judice*.

Appeal from order of corporation-juſtices, muſt be to the ſeſſions of the county, not of the corporation.

55. *Inter* The Inhabitants of Suddlecomb *and* Burwaſh. [491]

[Trin. 13 Will. 3. B. R.]

EXCEPTION was taken to an order of two juſtices, becauſe it was only ſaid to be complained by the churchwardens, that the perſon removed was likely to become chargeable, but not adjudged ſo by the juſtices. *Holt*, C. J. ſaid, That the juſtices cannot remove a man, unleſs he be likely to become chargeable, for otherwiſe they might remove a man of an eſtate; and he took a diverſity, that where the order is, *Whereas it appears to us*, &c. *on the complaint*, &c. *that* J. S. *is likely to become chargeable to the pariſh*, that will be well enough; but where it is, as here, *Whereas complaints has been made*, &c. that is ill: But it was agreed to be referred to the judge of aſſize. *Poſtea*, *Paſch.* 2 *Ann. B. R.* The caſe of the Inhabitants of *Darnell* in *Cheſhire*, the ſame reſolution. *Poſtea*, *Paſch.* 2 *Ann. B. R.* the ſame reſolution. It ought to appear, that the perſon removed, is a perſon removeable, and there

Complaint that H. is likely to be chargeable, not enough without adjudication; but, Whereas it appears to us, on complaint, &c. that H. is likely, &c. is ſufficient. Ante 473, 478, 479. Poſt 532. 1 Sid. 99. 1 Lev. 84. Raym. 65. 1 Show. 76. 3 Mod. 270. 3 Mod. 357. S. C. 6 Mod. 163, 164. Holt

576. Doug. 662. (637.) Sett. and Rem. 21, 38. 2 Str. 77, 587.

there ought to be a particular averment, that he is likely to become chargeable.

56. Dominus Rex *verſus* Johnſon.

[Trin. 13 W. 3. B. R.]

Seſſions may make original order to diſcharge apprentice. See 1 Salk. 67, 68. S. C. 2 Mod. 2, 287. 2 Saund 314, 316. 1 Vent. 174, 175. Rep. B. R. Temp. Hard. 101. Str. 243, 704.

THE juſtices of peace at *Newcaſtle* in *Northumberland* diſcharged an apprentice by an original order made at the ſeſſions, without any previous application to a juſtice of the peace to endeavour to compromiſe the matter, as the ſtatute directs; and after ſeveral debates it was adjudged, that if this had been a new thing, the Court would have thought a previous application to a juſtice neceſſary; but there having been ſo many original orders made at ſeſſions brought into this court, and confirmed here, it was too late to call this matter in queſtion; ſo the order was confirmed.

57. Minchcamp's *Caſe*.

[Trin. 13 Will. 3. B. R.]

Juſtices at ſeſſions are proper judges, whether fit to oblige H. to take an apprentice, or not. Vide 6 Mod. 163, 164. 2 Salk. 66, 68, 381. 6 Mod. 164. 1 Show. 76. 3 Mod. 270. Raym. 65. 1 Lev. 84. 5 Mod. 139, 140. 1 Saund. 314, 316.

HE being a merchant at *Mile-End*, two juſtices bound a poor girl apprentice to him; he appealed to the ſeſſions, and the order was diſcharged; becauſe they thought it unfit to compel a merchant to take an apprentice; and now this Court, on conſideration of the matter, confirmed the order of ſeſſions; becauſe the late act having made perſons compellable to take apprentices, and given an appeal to the ſeſſions, it was in the diſcretion of the juſtices at ſeſſions to determine, * whether it was or was not fitting to put an apprentice upon any one; and therefore the Court would not diſturb what the ſeſſions had done, but confirmed the order.

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58. *Inter* The Pariſhes of Swanſcomb *and* Shensfield.

[Paſch. 1 Ann. B. R.]

Order reverſed is final only between the parties: Order confirmed, or not appealed from, is final as to all the world. Ante,

A Poor man was ſent by two juſtices to *Shensfield*, and upon an appeal the order was confirmed; afterwards *Shensfield* ſends him by an order to *Swanſcomb*: All theſe orders being brought up by *certiorari*, the order to ſend him to *Swanſcomb* was quaſhed, becauſe, by the determination of the juſtices in affirmance of the order on

the appeal, *Shensfield* was eſtopped againſt all the world to ſay, That was not the place of his laſt legal ſettlement; for the juſtices cannot remove, but to the place of the laſt legal ſettlement; and ſhewing any later place of ſettlement will diſcharge the order on the appeal; and the diverſity is between an order diſcharged and an order confirmed upon appeal, or not appealed from. In the firſt caſe, the matter is at large as to all places, but the place to which the poor man was ſent, which, upon the appeal, was determined not to be the place of his laſt legal ſettlement. But in the later caſes, the place to which he was ſent is bound, and the order final and concluſive as to all the world.

pl. 45. 1 Vent. 310. 5 Mod. 417. 6 Mod. 269, 287.

Poſt. 524, 527. 18 Vin. Ab. 468. Bur. S. C. 17, 551, 425. Caſ. 59.

59. *Inter* The Inhabitants of Weſton-Rivers *and* St. Peter's *in* Marlborough.

S. C. 5 Mod. 143. called Rex ver. Inhab. of Wooton-Rivers.

UPON an order of two juſtices, it was objected, 1ſt, That it was not ſaid that the woman was poor, *&c.*, but lame, and like to become poor. 2dly, That it was not ſaid ſhe did not offer ſecurity. 3dly, That it was ſaid to be upon complaint only, and not of the churchwardens, *&c.* 4thly, It was not ſaid ſhe rented not a tenement of 10 *l. per annum.* The two laſt were the objections chiefly inſiſted upon; and the Court was clear as to the firſt of theſe two, *viz.* that it muſt be upon complaint of the churchwardens, *&c.*, and ſo appear; but, upon reading the return, another queſtion aroſe; for the return ſet forth at large, that upon complaint of the churchwardens and overſeers of the poor concerning *A.* to the juſtices, they the ſaid juſtices, one of the *quorum*, made the following order *in hæc verba: Foraſmuch as complaint hath been made to us*, &c., ſo that it was urged, that the defect of the order was ſupplied by the return of the *certiorari*. As to the laſt of the four exceptions, *Holt*, C. J. ſaid, that before 13 *Car.* 2. two juſtices * removed by conſequence of law, upon 43 *Eliz.*, becauſe that ſtatute makes a proviſion, that every pariſh ſhall maintain its own poor; therefore the juſtices conſidered who were properly the poor of a pariſh, and they were held to be ſuch as were there ſettled a convenient time, which was thought a month, ſo that a month's abode made an inhabitant. Still there remained ſeveral doubts, which occaſioned 13 & 14 *Car.* 2. *c.* 12., upon which ſtatute the preſent queſtion ariſes, *viz.* Whether the power to remove be not founded on 13 & 14 *Car.* 2., but on the law, as it was before? And ſince ſuch an order would ſerve to remove before, why will it not ſerve now, ſince the ſtatute? Or whether 13 & 14 *Car.* 2. obliges the juſtices

It is neceſſary to ſhew in a removal order that it was made upon complaint of the church-wardens, &c., but not that the party did not rent a tenement of 10 l. per annum. Vide ante 471. poſt. 524, 536. Farell 54. Mod. Caſes 88. S. C. Carth. 365. Holt 510. 3 Salk. 254. Set. and Rem. 18, 165. Caſes B. R. 89. Defect of an order not made good by matter alleged in the return.

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juſtices to alter the form of their order? And this depends upon this part of the ſtatute, *viz.* Whether it be by way of giving juriſdiction or reſtriction. At another day, *Holt*, C. J. pronounced judgment; as to the exception to the not averring that ſhe did not rent a tenement of 10*l. per annum*, he ſaid, the ſecondary had ſearched the precedents, and they are without this clauſe, according to the form of the orders before 14 *Car.* 2. And this order therefore is well enough; and if the party rents a tenement of 10 *l. per annum*, he may appeal to the ſeſſions. As to the other exception, it is fatal (*a*), for no one can diſturb a man coming into a pariſh, but they that have authority to do it. A complaint *ex officio* from one not concerned is nothing, it may be the pariſh are willing to keep him; and as to the return, that cannot cure the order, for they had exerciſed their authority before; and by the *certiorari* they have no power but to return the order *in hæc verba*; and therefore what they think fit to return farther the Court can take no notice of.

On certiorari juſtices can only return the order in hæc verba. Vide 1 Salk. 147.

(*a*) *Vide Foley* 267. *Set. & Rem.* 35. *Bur. S. C.* 24. *And.* 361.

60. *Inter* The Inhabitants of St. George's *and* St. Olave's, Southwark.

Juſtice cannot command the officers of the pariſh whither H. is ſent to remove him. Vide ante 436. pl. 18, & 489, pl. 51. Comb. 325. Carth. 449.

TWO orders were returned, the firſt for ſettling a poor man, one *Thomas Gill*, and the ſecond a confirmation of the firſt, upon an appeal to the quarter-ſeſſions: The firſt order recited, *That whereas complaint hath been made to us*, &c., *that* T. G. *had of late intruded into the pariſh of* St. George's, *we adjudge him to be laſt legally ſettled at* St. Olave's: *Theſe are therefore to require you to convey the ſaid* Tho. Gill *to the pariſh of* St. Olave's; and the direction upon the order was, *To the churchwardens and overſeers of the poor of the pariſh of* St. Olave's: Quaſhed; for they ought, and can only order the pariſh-officers where the intruſion is made, to make the removal.

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61. *Inter* The Pariſhes of St. Andrew's Holborn, *and* St Clement's Danes.

[Mich. 3 Ann. B. R.]

Seſſions being but one day in law, may alter their judgment and make a new

THE Court of quarter-ſeſſions of *Middleſex* made an order, and afterwards the ſame ſeſſions vacated it by a ſubſequent order; and a *certiorari* being brought, both orders were returned thereon. *Et per Holt*, C. J. You ſhould

ſhould not have returned the vacated order, but only the latter. This is as if we, diſliking our judgment, ſhould the ſame term make an entry of two different judgments, and return both upon a writ of error, which ought not to be: The ſeſſions is all one day, and the juſtices may alter their judgment at any time, while it continues: Thus, at the *Old Baily*, you ſee judgment *de pain fort & dure* given; and yet, if the party will plead, we will ſet aſide that judgment, and admit him to plead.

order; but muſt certify the latter only. Vide 6 Mod. 287. Poſt. 605, 606. 5 Mod. 396. S. C. Poſt. 606. Sett. and Rem. 168. Holt 511. Cumb. 66, 353.

Outlawry.

1. Rex & Regina *verſus* Tippin.

1 Show. 80, 309. 2 Show. 60, 68.

[- - - - 1 W. & M. B. R.]

ONE was outlawed upon an information for ſeducing a young gentleman to marry a young woman of a lewd character, and fined 5000 *l.* And it was moved in behalf of the defendant, that he could not be fined upon the outlawry, becauſe in miſdemeanor the outlawry does not enure as a conviction for the offence, as it does in caſes of treaſon and felony; but as a conviction of the contempt for not anſwering, which contempt is puniſhed by the forfeiture of his goods and chattels; and if he might be fined now, he muſt be fined again upon the principal judgment. And the firſt was held to be irregular, for the outlawry in theſe caſes is not a conviction, as appears by *Fleta* 42. *Quamvis quis pro contumacia & fuga utlagetur, non propter hoc convictus eſt de facto principali.*

H. outlawed for miſdemeanor, cannot be thereon fined for the fact. See 1 Lev. 33, 34. 2 Lev. 49. Raym. 17. 2 Chan. Caſ. 44. Carth. 384. Cumb. 456. 5 Mod. 221. 7 Mod. 39. 8 Mod. 177, 178.

2. Attorney General *verſus* Baden. [495]

[Mich. 5 W. & M.]

A. Owes money to *B.* on a judgment, and to *C.* on a bond; *A.* is outlawed at the ſuit of the obligee, and his lands ſeized on the outlawry; and the queſtion was, Whether the conuſee of the judgment could extend theſe lands? And it was held the outlawry ſhould be preferred, and that the king's hands ſhould not be amoved, unleſs the conuſee could ſhew covin and practice between the obligor and obligee.

Vide Ray. 17. 1 Lev. 33, 34. 2 Lev. 49. Ca. Parl. 75. Hard. 106.

3. Adlame *verſus* Colebatch.

[Paſch. 8 Will. 3. C. B.]

Where the plaintiff ſhall reverſe it at his own charge. 2 Vent. 46.

IT was moved in *C. B.* that the plaintiff might reverſe an outlawry at his own charge, upon affidavit, that the defendant was actually in the *Fleet* in execution for the plaintiff in another ſuit, and he knew it; and it was granted, becauſe the plaintiff ſhould have brought him to the bar by *habeas corpus*, and there have charged him with a new declaration (*a*).

(*a*) *Vide Rep. B. R. Temp. Hard.* 123.

4. Lee *verſus* Millard.

[Mich. 8 Will. 3. C. B.]

Note; The law is now altered in this particular, by ſtat. 4 & 5 W. & M. c. 18. Vide poſt. pl. 6. See 2 Lev. 464. Cro. El. 170, 373. Vi. Barnes 324.

A Like motion was made upon affidavit, that the defendant lived publicly, and was denied. *Et per Powell*, J. Such motions are frequently granted in *B. R.*, becauſe it is a great charge to reverſe an outlawry there; for the defendant muſt appear in perſon, but here he needs not, and the charge is but 16*s.* 8*d.*, not ſo much as a bailiff's fees for an arreſt. We have always denied this motion of late. 2 *Ven.* 46.

5. Arthur's *Caſe*.

[Hill. 8 Will. 3. B. R.]

Error to reverſe outlawry for felony; if there be lands there muſt go a ſcire facias [*againſt all the tertenants and lords, mediate and immediate*, 2 Hawk. c. 50. ſect. 13.] but if attorney-general confeſs on record that there are none, no ſcire facias is neceſſary. S. C. Holt 518. Vi. 1 And. 188.

ARTHUR was outlawed for felony upon five indictments, and afterwards came in, and was brought to the bar, and aſked what he had to ſay why judgment ſhould not be given? He produced five writs of error. *Et per Holt*, C. J. If there be no lands, the attorney-general may confeſs error, and then he ſhall plead preſently, and be tried upon the indictments. If there be lands, there muſt be a *ſcire facias* againſt the lords, mediate and immediate, to ſhew cauſe why he ſhould not have reſtitution. But if it be ſuggeſted on the roll that he has no lands, and the attorney-general confeſſes it, there needs no *ſcire facias*.

*** A *ſcire facias* muſt be into all counties where the criminal has lands, 3 *Keb.* 29. But not in outlawry for treaſon, 2 *Hawk.* c. 50. ſect. 13.

6. Anonymous.

[Mich. 10 Will. 3. B. R.]

H. Was outlawed in two actions, one was 10*l.* the other for 40*s.*; and, upon reverſing the outlawry, the Court took ſpecial bail for the firſt, and an appearance for the other, upon 4 & 5 *W.* & *M. c.* 18. *Note;* The recognizance was taken purſuant to 31 *Eliz. c.* 3. *Note;* Now *per* 4 & 5 *W.* & *M.* one outlawed, except for treaſon or felony, need not appear in perſon to reverſe an outlawry, but by attorney.

Defendant need not appear in perſon to reverſe outlawry, except in treaſon or felony. Vide ante, pl. 4. Sty. 297, 495. Carth. 7. 1 Wilſon 3. 2 Stra. 1178.

7. Symmons *verſus* Bingoe *and* Cook.

[Paſch. 4 Ann. B. R.]

THE defendant *Bingoe* being a feme, and waived upon proceſs of outlawry, it was now moved on her behalf, that upon filing common bail, ſhe might have liberty to reverſe the outlawry. *Per Cur.* The writ of error to reverſe the outlawry muſt be brought in the name of both the parties that are outlawed; and if one only appears, the other may be ſummoned and ſevered, and then the outlawry may be reverſed for the benefit of him who appears only. Before it can be reverſed for want of proclamations, the party outlawed muſt give bail to appear, and to anſwer in another action.

If two are outlawed, error to reverſe muſt be brought in the name of both, but one may be ſummoned and ſevered. Cro. El. 270, 278.

31 Eliz. c. 3.

If the party outlawed comes in *gratis* upon the return of the exigent, *alias* or *pluries*, he may be admitted by motion, to reverſe the outlawry, for any other cauſe, but want of proclamations, without putting in bail. If he comes in by *cepi corpus*, then he ſhall not be admitted to reverſe the outlawry, without appearing in perſon, as in ſuch caſe he was obliged to do at common law; or putting in bail with the ſheriff for his appearance upon the return of the *cepi corpus*, and for doing what the Court ſhall order. Appearing by attorney is an indulgence by 4 & 5 *W.* & *M.*, and the bail is to be ſpecial or common in this as in other caſes (*a*).

If H. comes in gratis, he may reverſe without bail; otherwiſe, if by cepi corpus. Cro. El. 707.

Of pleading outlawries in bar or abatement, vide Cro. Car. 566. 3 Lev. 29. 1 Show. 8. *And how to plead an outlawry before or after judgment, ſee* 1 Lutw. 110, 111. *And how to plead it in the ſame court, and how in another,* 1 Lutw. 40. 2 Lev. 50.

(*a*) *Recte. Sercole* v. *Hanſon,* 1 *Wilſ.* 3 *Bur.* 1482. *Campbell* v. *Daley,* 3 *Bur.* 2 *Str.* 1178. *Cracraft* v. *Gledowe,* 1920. *Vide Barnes* 326.

Vide poſt. 658, 701. Lutw. 1643. 2 Lev. 142. 1 Saund. Hob. 217. Fæſt. 9 & 38. 6 Mod. 28.

Oyer and ſhewing of Deeds, Writs, &c.

1. Saliſbury *verſus* Williams.

[Mich. 4 W. & M. B. R.]

Want of profert, only form. Vide ſtat. 4. 5 Anne, c. 16.

IN debt on a bond in the grand ſeſſions of *Wales*, the plaintiff omitted in his declaration to make a *profert*, *&c.* Judgment was for the plaintiff; and now in error this omiſſion was inſiſted on, and the Court held it only matter of form, of which no advantage could be taken after verdict, or on a general demurrer, and therefore affirmed the judgment. *Sid.* 249. *Cro. Car.* 190. *Cro. El.* 153. 217. 16 & 17 *Car.* 2. *cap.* 8.

2. Morris's *Caſe*.

[Tri. 7 Will. 3. B. R.]

Upon profert made unneceſſarity, oyer ſhall not be given. Vide 6 Mod. 28. 3 Lev. 50.

IN *replevin*, the defendant avowed for a rent-charge, and made title by a will, and pleaded it with a *profert*, and the plaintiff inſiſted to have *oyer*, alleging it was the avowant's folly to make a *profert* of it, and he ought to take advantage of it. *Et per Cur.* He was not bound to plead it ſo; it is but ſurpluſage, and we will not compel him to give *oyer* of it.

3. Roberts *verſus* Arthur.

[Mich. 13 Will. 3. B. R.]

Deed remains in Court all the term it is produced; otherwiſe, of letters teſtamentary or of adminiſtration. S. C. Caſes B. R. 598. Holt 421. Where patents muſt be ſhewn, and where not. Mod. Caſes 231. 5 Co. 76. 2 Lev. 142. Fæſt. 9, 38. Lutw. 1644.

UPON the *profert* of a deed it remains in court all that term, but no longer, unleſs it be controverted; but letters teſtamentary, or of adminiſtration, do not remain in court; for the party may have occaſion to produce them elſewhere. *Vide* 36 *H.* 6. 30. *Per Cur.*

Where the letters patent pleaded, are recorded in the ſame court where the plea is pleaded, the party need not ſhew them; but where in another court, he muſt plead them with a *profert in Cur.*, or the exemplification of them under the great ſeal. *Per Holt*, C. J.

4. Longavil *verſus* The Hundred of Iſleworth.

S. C. 6 Mod. 27, 28. Holt 518.

[Mich. 2 Ann. B. R. 2 Ld. Raym. 969. S. C.]

IN debt againſt the hundred of *Iſleworth*; the defendant pleaded in abatement *caption del robbers*, &c., the plaintiff replied *nul caption*, &c., upon which it was demurred, and a *reſpondeas ouſter* awarded; and now all being the ſame term, the defendant craved *oyer* of the writ, and that being ſet forth, pleaded the general iſſue. *Et per Holt*, C. J. To deny *oyer* where it ought to be granted is error, but not *e contra*; Therefore we ought either to grant or to enter the denial upon record, that they may aſſign it for error. If the plaintiff will conteſt it, he may ſtrike out the reſt of the pleading, and demur, in order to obſtruct the *oyer*: And at another day it was ruled, that the defendant could not have *oyer*, becauſe he had already pleaded in abatement, and having of *oyer* is never to enable the party to plead in bar, but to plead to the writ, which is done already, and therefore paſt.

Denial of oyer where it ought to be granted, is error, otherwiſe of granting it, where it ought not. 6 Mod. 28, 292.

Vide Doug. 227. (215). 1 T. R. 150.

5. Armit *verſus* Bream.

S. C. 6 Mod. 244. Holt 212. 1 Salk. 76, ante 425.

[Mich. 3 Ann. B. R.]

WHERE a man has obliged himſelf to make a deed, and is ſued for not doing it, it is not enough to ſay, that he made the deed, *viz.* leaſe, bond, &c., but he muſt ſet it forth, that the Court may judge of its ſufficiency; for it ought to be a good deed; but if it be to deliver, or ſhew, or produce a deed, that is, a deed already made, there it is enough to ſay, that he delivered, or ſhewed, or produced it. *Per Holt*, C. J.

Where H. is bound to make a deed he muſt ſet it forth; otherwiſe where to ſhew, deliver, and produce it only.

Vide Yelv. 111.

6. Cook *verſus* Remmington.

S. C. 6 Mod. 237.

[Mich. 3 Ann. B. R.]

IN *debt* upon a bond, the defendant demanded *oyer* of the condition, which was, to perform covenants in an indenture, and then demanded *oyer* of the indenture; and the plaintiff gave it him, omitting an indorſement, which was made before the execution of the deed; upon this *oyer* the defendant pleaded performance; the plaintiff replied and ſet forth the indorſement, and prayed judgment for the variance. *Sed per Cur.*, 1ſt, The defendant ſhould have ſet forth the indenture himſelf, being a party to it,

Defendant demands oyer of an indenture, which he ought to ſet forth himſelf, and the plaintiff gives oyer, but imperfect, it is at the defendant's peril. See 3 Lev. 50. 1 Saund. 3.

1 Sid. 50, 97, 495. 1 Mod. 266. 1 Vent. 37. 1 Saund. 9, 122. Cro. Jac. 360. 2 Keb. 104. Keilway 71.

and ſhould have pleaded performance to all the covenants therein. 2dly, The plaintiff was not obliged to give *oyer* of the indenture, and though he did, yet doing what he need not do, the ſetting it forth is not at his peril, as where he is * obliged to ſet it forth; nor is he concluded to ſay, that there is more contained in the indenture, but at liberty, as well as if the defendant himſelf had ſet it forth; and the Court held, that as the defendant was bound to ſet it forth, ſo he was bound to ſupply this omiſſion, and make his plea complete; and, for this, judgment was given for the plaintiff.

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*** A deed may be pleaded as loſt *Read* v. *Brookman*, 3 *Term Reports* by time or accident, without *profert*, 151.

Vide Lutw. 1009. Cro. El. 464. 5 Co. 49, 50. Hutt. 21. 1 Show. 284. 2 Show. 334. 2 Hawk. P. C. cap. 37.

Pardon General and Special.

1. Dominus Rex *verſus* Parſons.

[Hill. 3 W. & M. B. R.]

Pardon for murder not to be allowed without writ of allowance, certifying ſureties taken for the peace. See 1 Saund. 362. 1 Lev. 25, 26, 120. 3 Lev. 136, 332. Raym. 13, 370, 477. Farreſl. 153. 1 Show. 283. S. C. Holt 519. * 5 & 6 W. & M. c. 13.

PARSONS was indicted, convicted, and attainted for the murder of Mr. *Wade*, and pleaded their majeſties' pardon; and *note*, it was for murder by expreſs words, without any *non obſtante*, the *non obſtante* being taken away by the ſtatute of *W.* & *M.* * And *Holt*, C. J. aſked for the writ of allowance, which ſhould certify he had found ſurety of the peace within *eight* (*a*) months after the pardon; whereupon the writ of allowance was read: And *Holt*, C. J. ſaid, that the Court ought not to allow the pardon till thus certified, and that this was a condition precedent, by the ſtatute of *Edw.* 3.; and *Winnington* moved, that the pardon ought not to be allowed; arguing, that the crime could not be pardoned: But *Holt*, C. J. ſaid, there was as good reaſon why the king ſhould pardon an indictment of murder, which is his ſuit, as why a ſubject ſhould diſcharge an appeal, which is the ſuit of the ſubject; and that the king was, by his coronation-oath, to ſhew mercy as well as to do juſtice. He ſaid, the ſtatute of 2 *Ed.* 3. *c.* 3. meant only, that the king ſhould be fully informed before he pardoned any felony; and that the reaſon of that, and other reſtrictive ſtatutes, was for that,

King may pardon murder by expreſs words.

(*a*) Query, if this ought not to be *three* months. *Vide* Preamble to 5 *W.* & *M. c.* 13.

after

after the ſtatute of *Glouceſter*, *c.* 9., upon a murder done, it was uſual to apply to the Lord Chancellor, and gain a pardon by undue means and falſe ſuggeſtions, with general words in it; and this was the occaſion of thoſe reſtrictive ſtatutes, that application ſhould be made to the king in perſon, to the intent the king himſelf might be apprized of the matter. By 13 *R.* 2. *c.* 2., great difficulties are put upon thoſe that ſhall be ſuitors for a pardon of murder, they are to incur a penalty, *&c.*, but this was found grievous to the ſubject, and therefore was repealed by 16 *R.* 2. *c.* 26., which ſhews the neceſſity there is that the king ſhould have a power to pardon; upon which the pardon was allowed.

March 213, 217. Raym. 13, 477. 1 Show. 28.

[500]

2. Foxworthy's *Caſe*.

[Hill. 1 Ann. B. R. 2 Ld. Raym. 848. S. C.]

FOXWORTHY pleaded his pardon, and there was a miſtake in the proceedings. At another day he came, and having got the fault amended, it was allowed. His creditors now moved that they might have leave to charge him with actions, as *in cuſtodia*, but were not permitted to do it: For, *per Holt*, C. J. that might defeat the queen's pardon, by rendering him incapable of performing the condition, which is, to go beyond the ſeas, *&c.*; and this is not unreaſonable; for without the pardon the attainder had continued, and he muſt have been hanged; and there is no reaſon why the pardon ſhould put the creditors in a better condition than otherwiſe they would have been, to the prejudice of the party; for the pardon was given for his benefit, and not for the benefit of his creditors.

One pardoned ſhall not be charged in cuſtody with civil actions, quære? Raym. 370. 5 Co. 50. Far. 153. S. C. Holt 521.

Vide 1 Wilſ. 127.

Palatine Counties of Cheſter, Durham, &c.

Vide ante 452. 2 Lev. 111, 223. 1 Chan. Caſ. 41.

Wilbraham *verſus* Poley.

[Trin. 12 W. 3. B. R. 1 Ld. Raym. 591. S. C.]

MR. *Acherley* moved the Court to ſtay the return of a writ of error out of Chancery, to reverſe an outlawry in the county palatine of *Cheſter*, according to the

Error to the county palatine of Cheſter.

opinion of my Lord *Coke*, 4 *Inſt.* 214., *quod vide: Sed non allocatur*; for this old uſage is gone by 32 *H.* 8. *c.* 43., and 33.* 34 *H.* 8. *c.* 13. There were no outlawries in *Cheſter* before 33 *H.* 8. *c.* 13., for coroners are there introduced by that ſtatute; and there was no Chief Juſtice in *Cheſter* till Q. *Elizabeth*'s time, for till then there being but one, there could be no Chief. *Vide* the account of this cuſtom at large in *Dyer* 345, 320, 321.

Vide 1 Mod. 251. 2 Mod. 237. Ante 486. 11 Co. 25. b. Co. Lit. 125. b.

Pariſh Town, Hill, &c.

1. Rudd *verſus* Morton.

[Mich. 4 W. & M. B. R.]

Evidence of a reputed pariſh within 43 Eliz. Vide Cro. Car. 92, 384, 396. 4 Mod. 157, 158. called Rudd. verſ. Foſter, Poſt. 572. Raym. 67.

UPON a trial at bar in *replevin*, wherein the defendant avowed as overſeer of the poor, the queſtion was, Whether *Stratton* was a reputed pariſh of itſelf, or part of the pariſh of *Biggleſwade* in *Bedfordſhire? Et per Cur.* To make *Stratton* a reputed pariſh, within 43 *Eliz.*, it muſt have a parochial chapel, and chapelwardens and ſacraments, at the time the ſtatute was made; and becauſe the pretended pariſh of *Stratton* had but one chapelwarden, whoſe office it was to collect the rates taxed upon *Stratton*, and pay them to *Biggleſwade*, they were held part of the pariſh of *Biggleſwade*, and not a reputed pariſh within 43 *Eliz.*; and their having a diſtinct overſeer, and maintaining their own poor, was not thought ſufficient to make them a diſtinct pariſh.

Vill, quid. Vide 1 Inſt. 115. b. 1 Lev. 78. See Hob. 296. 4 T. R. 552.

A pariſh ſhall be intended a vill *prima facie*; adjudged *Mich.* 6 *W.* 3., *Wilſon* verſus *Laws*.

If a place be named generally, that place ſhall be taken to be and intended a vill; adjudged *Mich.* 10 *W.* 3. *B. R. Vinkeſton* verſus *Ebden*.

[502]

2. Dominus Rex *verſus* Bernard.

[Mich. 8 Will. 3. B. R. 1 Ld. Raym. 94. S. C.]

Regularly a conſtable is to be choſen in the leet or turn; may be

INDICTMENT, for that he being choſen conſtable in a corporation, according to cuſtom *debito modo*, refuſed to take upon him the office; and, upon demurrer, it was ſaid

ſaid *per Holt*, C. J. that at common law all conſtables were choſen at the leet: Where there is no leet, at the turn: Whether by the ſteward or the homage, has been a great queſtion: But without queſtion, a corporation, of common right, cannot chooſe a conſtable: By cuſtom they may, as having the government of the place repoſed in them; but then they muſt preſcribe for it.

in a corporation by cuſtom. See 1 Salk. 175, 380. 1 Mod. 13. Alleyn 78. 1 Rol. Abr. 535. pl. 2, 2, 541. pl. 5. 1 Bulſt. 174, 276. 5 Mod. 124, Caſes B. R. 125.

12. Skin. 669. S. C. Comb. 416. Holt 152. Set. and Rem. 214.

Parliament.

See 1 Chan. Caſ. 203, 211. & poſt. 509.

1. Prideaux *verſus* Morris.

Far. 13. S. C.

[Trin. 2 Ann. B. R.]

*[503]

IN an *action on the caſe* for a falſe return of parliament-men, againſt the ſheriff, the plaintiff declared, that whereas he was duly elected, the ſheriff returned *A. B.* to be duly elected, who was, in fact, not duly elected. Mr. *King* objected, that the right of election was only to be determined in the Houſe of Commons; for that it was a parliamentary matter, which ought not to be tried here, no more than the right of precedence. Mr. *Eyre contra*, That this Court may determine what is an act of parliament, 8 *Co.* 1., their privileges, *Mo.* 67. 1 *Ro.* 903. *Dyer* 275., the right of peerage: And here the right of election is no otherwiſe in queſtion, than as it is incident to the falſity. *Holt*, C. J. The cauſe of the plaintiff's ſuit is a wrong done out of parliament, and whatever falls under the regulation of law, and is done out of the houſes of parliament, is ſubject to the law of the land, for laws are to be executed out of parliament; but as for the rules of the * Houſe, as ſitting, meeting, *&c.*. they are within the Houſe, and the judges cannot know them, there being no practice of them out of parliament: But if the parliament ſhould make a law concerning them, or they ſhould become neceſſary to be determined on the account of ſome other matter cognizable by the judges, the judges muſt take notice and determine them, as in *Bynion*'s caſe.

No action lies at common law againſt an officer for a falſe return of members to parliament, unleſs where the right is determined, or cannot be determined in parliament. See 6 Mod. 45, 49. 1 Salk. 19, 20. 5 Mod. 311. Pollexf. 473. 3 Lev. 20, 30. Lutw. 88. 2 Sid. 168. 2 Lev. 50, 86, 114, 250. 2 Vent. 50. 1 Vent. 206. 6 Mod. 100. 1 Lutw. 82. N. L. 31. Holt 523. 8 S. T. 9. Mod. Caſes 48. King's Courts may judge of parliamentary matters incident. See 6 Mod. 45, 49. 2 Vent. 25. Pollexf. 470. 2 Keb. 356, 433, 435, 664. Lutw. 88, 80. Hob. 43. 1 Cro.

And *Holt*, C. J. ſeemed to be of opinion, 1ſt, That for a double return no action lay againſt the ſheriff before the ſtatute of 7 & 8 *W.* 3. *c.* 7., not only becauſe it is the only method the ſheriff has to indemnify himſelf; but when

142, 535. 1 Jo. 294. See 1 Wilſon 127, where C. J. Willes ſays, he ſhall always ſet his face againſt this caſe of Prideaux v. Morris.

when the right comes to be determined in parliament, one indenture returned is taken off the file, and then there is no double return. 2dly, He ſeemed to think, that for a falſe return the party could have no action, where there might be a determination in the Houſe of Commons, becauſe of the inconvenience of contrary reſolutions; and ſo if a ſuit be between *A.* and *B.*, *A.* is voted elected, *B.* cannot bring an action, and ſay, that he was duly elected and returned, becauſe his name does not appear upon record; and he is eſtopped to ſay, that *A.* was not duly elected and returned; but where the right of election either is determined, or cannot be determined in parliament, as in caſe of a diſſolution, an action lies for the falſe return, for the courts at law can neither anticipate nor contradict their judgment. Upon a writ of error of judgment in *C. B.*, for the defendant (*a*).

(*a*) In the caſe of *Wynne* v. *Middleton*, 1 *Wilſ.* 125., *Willes*, C. J. in delivering the opinion of the judges in the Exchequer-chamber, ſaid, he was clear that an action would lie at common law for a falſe or double return of a member of parliament, and that it was not neceſſary that there ſhould be a determination in the Houſe of Commons as to the election before an action for a falſe return could be brought. He ſaid he ſhould always ſet his face againſt the caſe of *Prideaux* and *Morris*. The point decided in *Wynne* and *Middleton* was, that in an action upon the ſtatute it is not neceſſary to appear that there was any reſolution of the Houſe of Commons reſpecting the right of election.

5 Mod. 311, 312.

2. Domina Regina *verſus* Paty & al.

[Hill. 3 Ann. B. R. 2 Ld. Raym. 1105. S. C.]

On commitments by the Houſe of Commons for privilege, no court can deliver on a habeas corpus: Held by three judges againſt Holt, C. J. See 1 Salk. 19, 20. 6 Mod. 45. 1 Mod. 145. 2 Lev. 114, 250. & ante 502. 2 Show. 84. Pollexf. 470. Fareſt. 13. 6 Mod. 47. Holt 526. S. C. 3 Keb. 365, 389, 664.

THE defendants having been committed to *Newgate* by the Houſe of Commons, were now brought into court by ſeveral writs of *habeas corpus*; and the cauſe of their commitment was returned to be a warrant ſigned *Robert Harley*, Speaker, requiring the keeper of *Newgate* to take into his cuſtody the ſeveral perſons, defendants, for having commenced and proſecuted an action at law againſt the conſtables of *Ayleſbury*, for refuſing their votes in the election of members of parliament, in contempt of the juriſdiction and open breach of the known privileges of the Houſe of Commons. Mr. *Lechmere*, *Page*, *Montague*, and *Denton*, who were of counſel for the priſoners, prayed that they might be diſcharged for ſeveral reaſons: 1ſt, Becauſe the warrant was not under ſeal, as it ought to be. 2dly, Becauſe the commitment was to remain during pleaſure. 3dly, Becauſe they had done no unlawful act; for the proſecution of a ſuit is lawful, and no breach of the privilege of that Houſe. But *Powell*, *Powys*, and *Gould*, Juſtices,

tices, held, 1ſt, That the commitment was well enough in form; becauſe it was according to the uſual manner of commitments by that Houſe. 2dly, That the Houſe of Commons were the proper judges of their own privileges; and this Court was now eſtopped to ſay, that this was not a breach of the privileges of the Houſe of Commons, or that the Houſe of Commons had no ſuch privilege. *Holt*, C. J. *contra* ſaid, that this was no breach of privilege of the Houſe of Commons; that the commencing and proſecution of an action did not neceſſarily imply a going farther than the bare filing and continuing of an original, which is no breach of privilege: He ſaid, the ſuing was no breach of privilege, nor can their judgment make it ſo, nor conclude this Court from determining contrary; when the Houſe of Commons exceed their legal bounds and authority, their acts are wrongful, and cannot be juſtified more than the acts of private men: That there was no queſtion but their authority is from the law, and as it is circumſcribed, ſo it may be exceeded: To ſay they are judges of their own privileges and their own authority, and no body elſe, is to make their privileges to be as they would have them. If there be a wrongful impriſonment by the Houſe of Commons, what Court ſhall deliver the party? Shall we ſay there is no redreſs, and that we are not able to execute thoſe laws upon which the liberty of the queen's people ſubſiſts? To conclude, All Courts are ſo far judges of their own privileges, and intruſted with a power to vindicate themſelves, that they may puniſh for contempts; but to make them, or any Court, final judges of them, excluſive of every body elſe, is to introduce a ſtate of confuſion, by making every man judge in his own cauſe, and ſubverting the meaſures of all juriſdictions (*a*).

Filing and continuing original, no breach of privilege.

Authority of Commons circumſcribed by law. Poſt. 522.

And now a new queſtion was ſtarted and referred to the judges, Whether the queen ought to allow a writ of error in this or any other caſe *ex debito juſtitiæ*, or *ex mera gratia?* And ten of the judges were of opinion, that the queen could not deny the writ of error; but it was grantable *ex debito juſtitiæ*, except only in treaſon or felony. *Vide* 2 *Lev.*, *Thurſton*'s caſe. *Price* and *Smith* held, that the

Writ of error is of right in all caſes, except treaſon and felony. See 2 Show. 85, 98. 6 Mod. 130.

(*a*) This queſtion was again brought before the Court of King's Bench in the Hon. *Alex. Murray*'s caſe, 1 *Wilſ.* 299.; and before the Common Pleas in the caſe of *Braſs Croſby*, 3 *Wilſ.* 188. *Bl.* 754.; in both of which it was ruled, according to the above deciſion, that a perſon committed by the Houſe of Commons for a contempt cannot be diſcharged by a Court of common law. The learning upon the ſubject appears moſt fully in *Croſby*'s caſe, as reported by *Wilſon*; from which it ſeems that all Courts are final judges of contempts againſt themſelves. *Vide* 4 *Inſt.* 15, 17. 1 *Sta. Tr.* 89. 2 *Sta. Tr.* 617, 620. 3 *Sta. Tr.* 208. 7 *Sta. Tr.* 437. 11 *Sta. Tr.* 317. 2 *Hawk.* ch. 15. ſec. 72, 73, 74.

ſubject

ſubject could not of right demand them in any criminal caſe; Then it was a doubt whether any writ of error lay upon a judgment given on a *habeas corpus?*

3. Coundell *verſus* John.

[Hill. 5 Ann. B. R.]

Action lies, not for a falſe return, but upon the ſtatute 7 & 8 W. 3. 1 Wilſon 125. See 6 Mod. 45, 49. 1 Salk. 19, 20. 5 Mod. 311. Fareſt. 13. Pollexf. 470. 3 Lev. 29, 30. Lutw. 88. 2 Sid. 168. 2 Lev. 50, 86, 114, 250. 3 Keb. 26, 32. 1 Vent. 206. 2 Vent. 25. 1 Danv. 205.

IN *caſe;* the plaintiff declared that he was elected member of parliament for ſuch a borough, purſuant to the queen's writ, *&c.*, and that the defendant returned two other perſons to be elected, and that he the plaintiff petitioned the Houſe, and was adjudged by * [505] them to be duly elected, and his name ordered to be inſerted in the return, and the name of the other to be raſed. After verdict on not guilty, the defendant moved in arreſt of judgment, that here is no cauſe of action; for it appears now, the plaintiff has had the effect of his election; he is returned; he has his place; there is nothing wanting wherein he can pretend himſelf injured, but the coſts he has been at in the proſecution; and as to them, it ought to be ſuppoſed, that the Houſe conſidered of them. This was endeavoured to be made good upon the ſtatute 7 & 8 *W.* 3. But Sir *Tho. Parker*, for the defendant, anſwered, That this declaration cannot be taken to be founded upon that ſtatute, becauſe the fact was laid not agreeable to it, nor was it ſuch an action as was intended by the ſtatute, which differs from a general action; for, firſt, an action grounded upon a general prohibition of a ſtatute, ought not to be for the party only, but the queen and party *tam quam*; for a fine is due to the queen for the breach of the ſtatute, as well as ſatisfaction to the party injured. *Et per Cur.* Where a ſtatute introduces a new law, by giving an action where there was none before, or by giving a new action in an old caſe, the plaintiff need not conclude *contra formam ſtatuti*. But if a ſtatute gives the ſame action, with a difference of ſome circumſtances, as double damages, *&c.* the plaintiff muſt either conclude *contra formam ſtatuti*, or make his caſe ſo particularly within the ſtatute, that it may appear to be ſo; and becauſe he had not done it in this caſe, judgment was given for the defendant.

Vi. 1 Salk. 212.

Parſon, Vicar, and Curate.

Vide 2 Lev. 61. 3 Leon. Caſ. 46 & 148. 4 Leon. Caſ. 367. Cro. Car. 105. Cro. El. 490.

Birch *verſus* Wood.

[Hill. 10 W. 3. B. R.]

WOOD, pretending to be curate of a chapel of eaſe in the pariſh of *Preſton*, ſued the vicar of the pariſh in the Spiritual Court, for the arrears of a penſion claimed by preſcription; and a prohibition was granted *niſi cauſa*; for that the curate was removable at the will of the parſon, and ſo cannot preſcribe, but his remedy muſt be by *quantum meruit*.

Curate is removable at the will of the parſon. Cafes B. R. 249. S. C.

Vide Fareſt. 63. *That pariſh-bounds are not to be proved by the parſon.*

Vide 2 Ver. 425. Doug. 142. Cowp. 437.

Pauper.

Poor priſoners, vide poſt. 521. 2 Lev. 142. 6 Mod. 22, 301.

1. Anonymous.

[Mich. 9 Will. 3. B. R.]

A *Pauper* ſhall not pay coſts, unleſs he be nonſuit; but then he ſhall pay coſts, or be whipped; *per Holt*, C. J. *Quære tamen*; for afterwards, in another term, I moved that a *pauper* might be whipped for non-payment of coſts upon a nonſuit, and the motion was denied *per Holt*, C. J. ſaying, he had no officer for that purpoſe, and never knew it done. *Note alſo*; If a *pauper* gives notice of trial, and does not proceed, he ſhall be diſpaupered.

Pauper ſhall pay coſts of nonſuit. See 1 Sid. 261. 6 Mod. 88. Fareſt. 114. 3 Salk. 107.

Vide Str. 983. Fort. 320. 3 Wil. 24.

2. Anonymous.

[Mich. 11 Will. 3. B. R.]

MR. *Northey* moved to diſpauper a parſon, who was plaintiff in an action, becauſe he had a living of 40 *l. per annum*. *Turton* and *Gould*, Juſtices, *contra*, becauſe he ſwore

Diſpaupering.

ſwore he was in debt more than it was worth. *Holt*, C. J. differed from them; for his being indebted, or his eſtate being mortgaged, is no reaſon; it is enough that he has a conſiderable eſtate in poſſeſſion.

Vide ante 442. 2 Lev. 203, 212. 6 Mod 36. Poſt. 519.

Payment and Satisfaction, &c.

1. Maſon *verſus* Williams.

[In Canc.]

Executor may pay debts of a higher nature after a decree quod computet, not after final. See Cro. El 793. 2 And. 157. 1 Rol. Abr. 925, 927. 1 Sid. 21. Vaugh. 89. 5 Co. 28. 2 Chan. Caſ. 54, 84. 2 Vern. 299. Prec. Chan. 79.

PENDING a bill in equity againſt an executor, or after a decree *quod computet*, an executor may pay any other debt of a higher nature, or as high a nature; but this muſt be intended where he has legal aſſets; for if he has only equitable aſſets, the Court will not indemnify him, and ſuffer him to prejudice and diſappoint the firſt ſuitor; and where there is a final decree againſt an executor, and he pays a bond, it is a miſpayment; for a decree is in the nature of a judgment (*a*). *Per Cowper*, Lord Chancellor.

1 Vez. 214.

(*a*) This is only true ſo far as relates to perſonal eſtate, *Bligh* v. Lord *Darnley*, 2 *P. Wms.* 621. *Vide Morrice* v. *Bank of England*, *Temp. Talb.* 222. *Aſtley* v. *Powis*, 1 *Vez.* 496.

2. Carter *verſus* Sheppard.

[Paſch, 10 Will. 3. B. R.]

*[508]

A. receives money of B. by the hands of C., it is A.'s money, and he muſt abide by the loſs. See 6 Mod. 36. 2 Salk. 442. 5 Mod. 2, 8. S. C. Comb. 475. Caſes B.R. 289. Vide ante 442, &c. ib. 3 Mod. 86. 3 Lev. 299. 2 Show. 296,

UPON a point referred at *niſi prius*, the caſe was, *H.* having a note of 100 *l.* upon a goldſmith, goes to receive it: While he is in the ſhop, one *Daly* brought money in to pay to the goldſmith, who thereupon orders *H.* to receive the money of *Daly*; accordingly *H.* receives 50 *l.*, part of his hundred, pulls a bag out of his pocket, puts the money into the bag, lays it down by him, and proceeds to tell the reſt; in the mean time * a ſtranger comes in, catches the bag of 50 *l.* from him, and runs away. *H.* brings *trover* againſt the goldſmith for his note, pretending the property of the 50 *l.* remained in the goldſmith, though put into the plaintiff's bag; for he had ſtill a right to count it

it over, and ſo it was not abſolutely paid to the plaintiff. *Cur. contra*: *H.* had appropriated the money, by putting it into his bag, and might bring *trover* for the bag and money, as well as if he had put both bag and money into his pocket. 297. Molloy li. 2. c. 10. Comb. 475. S. C. Hob. 154. 2 Mod. 23, 24.

3. Marle *verſus* Make.

[Trin. 13 Will. 3. B. R.]

PAYMENT to a bond with condition indorſed, is a good plea before breach, but not afterwards, no more than to an action of debt upon a ſingle bill; for the benefit of the condition is loſt when the breach is made (*a*). *Per Holt*, C. J. Payment before breach or after. Vide Lutw. 472, 473. 5 Co. 117. 3 Salk. 118. S. C. Holt 122. 2 Wilſon 150. 2 Stran. 994.

(*a*) But now, by ſtat. 4 and 5 *Ann.* *c.* 16., if the money is paid any time before the action brought, it may be pleaded.

4. Cranmer's *Caſe*.

[In Canc.]

MRS. *Fiſher* was indebted in 50 *l.* to *Cranmer*, and left him a legacy of 500 *l.*, and made him executor, and, after the making of her will, borrowed 150 *l.* more of him, and died. The Maſter of the Rolls decreed that this legacy ſhould be a ſatisfaction of both the debts, that contracted after the will, as well as that contracted before; but *Harcourt*, Lord Chancellor, reverſed the decree, becauſe a court of equity ought not to hinder a man from diſpoſing of his own as he pleaſes; and when he ſays he gives a legacy, we cannot contradict him, and ſay he pays a debt; and as to the debt contracted afterwards, he ſaid there was no pretence to make this to be a payment of that: If a legacy be leſs than the debt, it was never held to go in ſatisfaction; ſo if the thing given was of a different nature, as land, it ſhould not go in ſatisfaction of money; ſo if the legacy be upon condition, for by the breach he may be a loſer, whereas the will intended it for his benefit. *Note*; In all theſe caſes the intention of the party ought to be the rule. Legacy to a creditor, greater or leſs than the debt, how to be taken. Vide Cuthbert cont. Peacock. Ante 155, 415, 436. 2 Chan. Caſ. 25. Vide 2 Atk. 300. 1 P. Wms. 299. 3 Atk. 65. 1 Vez. 262. 2 Vez. 617, 635. Vide alſo, note on this point, 1 Salk. 155.

Payment to the ſheriff on a *fi. fa.* is good, not ſo to the goaler. 2 *Lev.* 203.

Where payment to the plaintiff by the bail is a diſcharge. *Vide ib.* 212.

Note; Payment was formerly no plea to a *ſci. fa.* on a judgment in debt, but now it is by the ſtat 4 & 5 *Ann.* *cap.* 4. 3 *Lev.* 19, 20.

Peers of the Realm.

Vide Parliament Caſes, pag. 1 to 11. Fareſſ. 15, 38. 1 Chan. Caſ. 221. 2 Chan. Caſ. 163, 214.

1. Rex & Regina *verſus* Knollys.

[Trin. 6 W. & M. B. R. 1 Ld. Raym. 10. S. C.]

Ante 47. S. C. Poſt. 512. 3 Salk. 242. Carth. 297. Comb. 273. Skin. 336, 517. Caſes B. R. 55. Holt 530. Trem. 11. 8 S. T. 50, 58.

INDICTMENT was found at *Hicks's Hall* againſt *Charles Knollys*, for the murder of Captain *Lawſon*, which was removed into *B. R.*. The defendant pleaded in abatement, that *William Knollys*, Viſcount *Wallingford*, by letters patent under the great ſeal of *England*, which he produced in court, bearing date *Auguſt* 18., 2 *Car.* 1., was created Earl of *Banbury*, to him and the heirs-male of his body: That *William* had iſſue *Nicholas*, who ſucceeded him in the ſaid title; and that the ſaid honour deſcended to him the defendant from the ſaid *Nicholas*, as ſon and heir: *Et hoc paratus eſt verificare.* It was replied, that 14 *Decemb.* 4 *W. & M.*, the ſaid defendant petitioned the lords then aſſembled in parliament, to be tried by his peers, and the lords diſallowed his peerage, and diſmiſſed the petition.

The defendant demurred, and the attorney-general joined in demurrer.

The firſt point conſidered *per Holt*, C. J. was, What an earldom was, and wherein it conſiſted?

Before the time of *Ed.* 3. there were but two titles of nobility, *viz.* earls and barons.

Baron.

Barons were originally created by tenure, afterwards by writ, and laſt of all by patent; *ſcil.* about 11 *R.* 2.

Earl, his creation and office. Note; In the Saxon times the earls of counties being officiary, were elected by the freeholders in their folkmotes, and were removable for male adminiſtration. Vide LL. Edw. c. 35. LL. Eadgari, c. 5. LL. Canuti, c. 17. and Saxon Chron. ſub anno 1055.

As to earls, 1ſt, They were always created by letters-patent. *Vide Seld.* 536.

2dly, An earldom conſiſted in office for the defence of the kingdom. *Vide Bract. lib.* 1. *c.* 8. *Comites* had their name, not from counties, but *a comitando regem.* 9 *Co.* 49. It may be entailed as any other office may, within *Weſtm.* 2.

3dly, Earldoms conſiſt of rent and poſſeſſions, *&c.*, which were anciently great. *Vide mag. char.* The relief of his heir is 100 *l.* This being premiſed, he went on to conſider the objections:

1ſt, That it is not alleged by the defendant that he is *unus parium regni Angliæ*, but only *unus parium regni*; nor is *Banbury* alleged to be in *England*, and an *Iriſh* peer may be made under the great ſeal of *England*.

To

To this he anſwered, That the great ſeal of *England* is appropriated to *England*, and what is done under it has relation to *England*, and to no other place; and though the king may create an *Iriſh* peer under his great ſeal of *England*, yet that muſt be by expreſs words, being by ſpecial act of prerogative. An act of parliament does not extend to *Ireland*, unleſs particularly named; and it is a foreign intendment to ſuppoſe him an *Iriſh* peer, and therefore is to be rejected.

King may create an Iriſh peer under the great ſeal of England, by expreſs words. 2 Veat. 4. Dyer 303.

The place from whence an earl takes his title, is not material; it is not neceſſary there ſhould be ſuch a place in *England*, or indeed any where. *Albemarle* is not in *England*, and there is really no ſuch place as *Rivers*, though we have an earl of that name.

Place whence title is taken, not material. Co. Lit. 20. a. 13 & 14 Ed. 2.

2dly, It is objected, That the defendant ought to have concluded his plea, with *prout patet per recordum*, and have produced a writ to certify the diſcents.

As to the writ to certify the diſcents, that is not of neceſſity, but uſed merely for expedition; and if his peerage had been created by writ, then it would have been triable by the record, and this a fatal exception: But letters patent may be pleaded and ſhewn to the Court, and the adverſe party cannot deny them: And as this caſe is, here being diſcents, if the defendant had concluded as the king's counſel ſay he ſhould, it would have been an impracticable concluſion, and conſequently void. And in the precedents cited of the other ſide, there were no letters patent pleaded; nor could there in this caſe be any ſuch iſſue as earl, or not earl; for the letters patent under the great ſeal could not be denied or queſtioned, but by pleading *non conceſſit*.

3dly, That the defendant is concluded of his peerage by the order of the Houſe of Lords.

To this *Eyre*, J. ſaid, The defendant had a title to his honour by legal conveyance, and that it was under the protection of the common law, and could not be taken from him but by legal means. That the Houſe of Lords could no more deprive one of a peerage, than they could confer a peerage. That the defendant's right ſtood upon the letters patent, and his legitimacy; that the letters patent could not be cancelled without a *ſcire facias*; and that the defendant could not now be proved a baſtard, or illegitimate.

Houſe of Lords cannot deprive of peerage. Parliament Caſ. 2, 3, &c.

Holt, C. J. gave theſe reaſons: 1ſt, That this order was not a judgment of parliament; the parliament conſiſts of the king, the lords ſpiritual and temporal, and the commons. The judicial power is in the lords only; yet legally and virtually it is the judgment of the king, if not of the commons; and writs of error in parliament are *coram nobis in præſenti parliamento*. *Vide Fleta*, *c.* 17. All

Judicial power of parliament is in the peers, but it is virtually the judgment of the king. All juriſdiction from the crown.

power of juriſdiction is derived from the king; if that be an author to be credited.

Houſe of Peers has a double authority.

* [511] * The Houſe of Lords has a double authority, as parliament and the courſe of the houſe, between which we muſt diſtinguiſh by their ſtyle. Journals are no records of parliament, and therefore we cannot take notice of them. *Hob.* 110. *King* and *Hunſdown* verſus *Arundal* and *Howard*. Judgments ought to be given in their proper ſtyle; and therefore if this Court, which is *coram rege*, enter judgment *per juſticiarios de B. R.* it is void.

But no original juriſdiction over a cauſe mixed with fact.

The Houſe of Lords has no juriſdiction over an original cauſe mixed with matter of fact; becauſe, 1ſt, that ſupreme court is the *dernier reſort*; beſides that, for the moſt part, original cauſes are mixed with matter of fact, and it is below the dignity of ſo ſupreme a judicature to try a matter of fact. It is for this reaſon, error in fact, in the Court of King's Bench, muſt of neceſſity be redreſſed before the judges of this Court. 2dly, If the parliament ſhould take cognizance of original cauſes, the ſubject would loſe his appeal, ſo much indulged by the common law in all caſes. Cauſes come not thither, till they have tried all other judicatures. For this reaſon, within theſe four years, judgment was given againſt the earl of *Macclesfield* in the Exchequer; he brought error in the Houſe of Lords; and the queſtion was, Whether by 31 *Eliz.* 3. the Exchequer-chamber ſhould not interpoſe? And the writ was abated; and it was held, that the Exchequer-chamber ſhould interpoſe. This dignity is a title by common law; and if a patentee be diſturbed of his dignity, the regular courſe is, to petition the king, who indorſes it, and ſends it into the Chancery. *Vide Staundf. Prerog.* 72. 22 *E.* 3. 5. *Long* 5° *E.* 4. 117. The king could give precedency by the common law, but is bound by 31 *H.* 8. *c.* 10.

When error lies not from the Court of Exchequer to the Houſe of Lords.

Where a patentee is diſturbed of dignity, how to proceed.

If a peer commits treaſon, he muſt be tried by his peers, and they may order a trial; but the king may chooſe whether he will make a high ſteward.

2dly, No plea was depending in the Houſe of Lords; for the defendant did not petition to enjoy, but ſuppoſed himſelf in poſſeſſion.

4thly, Here was no judgment. A Court can give no judgment in a thing not depending, or that does not come in a judicial way before that Court: Here the title of the earldom was not before them. If treſpaſs be brought for a treſpaſs done in the ground belonging to a houſe, and it appears at the trial the plaintiff has no title to the houſe, yet the Court cannot give judgment to turn him out.

Judgment muſt be complete and formal.

5thly, A judgment ought to be complete and formal. If a *quo warranto* be brought for uſurping royal franchiſes, and the Court give their opinion that the defendant has

no

no title; yet unleſs they go on, *et quod ab inde excludatur, &c.* it is nothing. So in the caſe of *Lovell*, 2 *Cro.* 284. In debt on an obligation the defendant pleaded a bar by verdict and judgment in a former action wherein the entry was, that the defendant ſhould recover coſts, *et quod eat inde ſine die*: Here, becauſe there was no judgment, *quod querens nil capiat per breve*, it was adjudged naught; for diſmiſſion is no judgment in a court of law. [512]

Diſmiſſion is no judgment.

Objection: It is ſaid that this judgment was given *ſecundum legem parliamenti.*

Anſw. *Lex parliamenti* muſt be looked on as the law of the kingdom; but admitting it were a particular law, yet if a queſtion ariſes determinable in the King's Bench, the King's Bench muſt determine it. *Vide Dy.* 60.

Lex Parliamenti. Ant. 503, 504.

14 *Car.* 2. *C. B. Binion* verſus *Eveling.* Filing an original againſt a parliament-man was adjudged to be no breach of privilege. If a man be committed by parliament, and the parliament is prorogued, this Court will grant a *habeas corpus.* But no precedent hath been ſhewn to warrant the determining inheritances originally *per legem parliamenti*; if it be ſo determinable, it muſt be by act of parliament, but there is no ſuch; or by cuſtom, but there is no ſuch cuſtom. But if inheritances were determinable in parliament, without their having juriſdiction, they would have uncontrollable power, and *res eſt miſera, ubi jus eſt vagum.* And he concluded that judgment ſhould be given for the defendant, and accordingly the indictment was abated: So the defendant was not tried for the murder at all.

Vi. ſt. 12 & 13 W. 3. c. 3. and 10 G. 3. c. 50.

Inheritances not originally determinable in parliament.

2. Lord Banbury's *Caſe.*

[Paſch. 5 Ann. B. R. 2 Ld. Raym. 1247. S. C.]

LORD *Banbury* was taken on a *latitat* ſued againſt him by the name of *Charles Knollys*, Eſq. and it was now moved for a *ſuperſedeas*, offering to ſhew the letters patent of creation, and an affidavit that he was the perſon; and it was agreed, That if the *latitat* had been ſued againſt him by the name of lord, it ſhould have been ſuperſeded; for the law ſuppoſes a peer able to anſwer the demand of any perſonal action, and the body is only liable for want of being reſponſible in ſubſtance: And if he had ſat in parliament by virtue of any writ of ſummons, and had been ſued as *Charles Knollys*; but not having ſat in parliament, they could not take notice of his peerage, and would not proceed to try it on a motion.

H. arreſted by the name of a commoner, the Court will not try whether a peer or not, upon a motion. Vide antea 451, 509. Parl. Caſes, 2, 3, &c. Fareſt. 15, 38. Rep. B. R. Temp. Hard. 34. 2 Str. 985.

3. Sir Thomas Meers *contra* Lord Stourton.

[In Canc.]

Where a peer ſhall depoſe on oath or honour. 1 Will. Rep. 146. S. C.

[513]

SIR *Thomas Meers* exhibited a bill againſt the lord *Stourton*, and it was ordered that the lord *Stourton* ſhould be examined upon interrogatories touching his title; and it was objected, that he being a peer of the realm, ought to anſwer upon his honour only; and it was ruled by *Harcourt*, Lord Keeper, that where a peer is to anſwer to a bill, his anſwer put in upon his honour is ſufficient (*a*); but where a peer is to anſwer interrogatories, to make an affidavit, or be examined as a witneſs, he muſt be upon his oath.

(*a*) *Jones* 154.

Perjury.

See Fareſ. 101. 2 Show. 1, 2. 165, 486. 3 Mod. 116, 134. 6 Mod. 176, 168. 5 Mod. 343 and 348. 1 Hawk. P. C. cap. 69.

Dominus Rex *verſus* Greepe.

5 Mod. 343. S. C. Carth. 421. Holt 535. Comb. 459.

[Mich. 9 Will. 3. B. R. 1 Ld. Raym. 256. S. C. Comyns 43. S. C.]

Inuendo. Vide Yel. 12. Cro. El. 497. Hob. 2, 3, 45, 461. Hutt. 65. Hetl. 174. Aleyn 39, 92. 1 Vent. 337. 1 Sid. 52. 2 Show. 305 and 411. 3 Mod. 53, 54. 3 Lev. 69, 166. Innuendo may explain or apply, but cannot add to, or change the ſenſe. Carth. 421. S.C. 5 Mod. 233. 4 Rep. 17. Comb. 459. S.C. 3 Bulſt. 265. 1 Bulſt. 183.

AN information for perjury ſet forth, that the defendant, upon giving a leaſe and releaſe in evidence in a certain cauſe, bearing date the 15th and 16th of *July* 1681, executed at *Albemarle-houſe*, to which Mr. *Stroud* was witneſs, ſwore that Mr. *Stroud* was, the middle of *July* 1611, at *Newnham*, *innuendo Newnham* in *Devonſhire*, *ubi revera non fuit apud N. prædict.* A verdict was for the king, but judgment was arreſted; and it was held,

1ſt, That *Newnham* was but an *individuum vagum* without the *innuendo*, and might be as well *Newnham* in *Middleſex* as *Newnham* in *Devonſhire*, or ſome far diſtant place: And if *Newnham* was at the next door, *Stroud* might be at *Newnham*, and yet be at *Albemarle-houſe* in *Middleſex* too in the middle of *July*.

2dly, That the *innuendo* could not reſtrain the *individuum vagum* to *Newnham* in *Devonſhire*; for it is no averment, but in the nature of a *prædict.* It may ſerve for an explanation

nation to point out where there is precedent matter, but never for a new charge: It may apply what is already expreſſed, but cannot add or enlarge, or change the ſenſe of the precedent words: So here, the word *Newnham* did not import *Newnham* in *Devonſhire; ergo* the *innuendo* cannot enlarge the importance of it, and make it ſo ſignificant. *Vide Sty.* 333. 3 *Cro.* 428. *Goldſb.* 191. *Hob.* 3, 6. 45. 1 *Ro.* 82, 83, 84. 2 *Bul.* 81, 82. 1 *Ven.* 337. *Hutt.* 44. 4 *Co.* 20. *Yelv.* 21. 1 *Cro.* 321. *A.* 32.

Vi. 1 T. R. 70. Bl. 960. Cowper 276, 684.

*3dly, That a man ought not to be drawn into a conſtructive perjury; and that if the matter of this oath was certain, it is material to the iſſue, and ſufficient to be perjury; and *Holt*, C. J. denied *Goldſ.* 191., and held, that if a man gives evidence to the credit of a witneſs, though this be not the iſſue, yet it is perjury.

Perjury may be in evidence to the credit of a witneſs 6 Mod. 168.

* [514]

4thly, As to the objection, that this was an information at common law, and not on the ſtatute, that makes no difference as to the certainty of the charge; for it is no more infamous now than it was at common law; the difference is only, that where *H.* is convict upon the ſtatute, it is part of the judgment to be diſabled; but at common law it is only a conſequential diſability: *Ergo*, in the latter caſe the king may pardon, and that reſtores him to his teſtimony; otherwiſe in the former, for in that caſe he muſt reverſe the judgment, or cannot be reſtored.

Charge ought to be equally certain at common law, and on the ſtatute.

Where H. is convict on the ſtatute, diſability is part of the judgment; at common law it is only a conſequence. Vide ante 461. Poſt 619, 691.

*** It appears by the report in Lord *Raymond*, that the judgment in *B. R.* was reverſed in the Houſe of Lords.

Pleas and Pleadings.

Vide ante Abatement, Demurrers, Juſtification, &c. p. 496.

1. Anonymous.

[Mich. 1 W. & M. B. R.]

IF a man be bound by recognizance to appear the firſt day of the term, and is charged upon his appearance with an information, in caſe the information be laid in *Middleſex*, the party has time to plead during all that term, ſo that it cannot come to trial in the term; but in caſe it be laid in any other county, the party ſhall have time to plead till the next term, for he is as much concerned to

Upon an information in Middleſex, the defendant ſhall have the term to plead; in the country, till next term. Poſt 624, 650. Mod. Caſes 22. 1 Salk. 219.

defend himſelf in thoſe caſes as in any civil action; and ſince the law allows him counſel, the law allows him time likewiſe to conſult with them; for not to allow the means of defence, is to take away the ſubject's defence; otherwiſe it is of capital offences: But *note;* In theſe caſes there is no counſel. Alſo where the party comes in by *cepi corpus*, or upon an outlawry, he ſhall plead preſently, for then he has been guilty of a contempt. *Per Cur.* Contrary to the caſe of the ſeven biſhops.

Time to plead, vide poſt, pl. 3, 4.

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Vi. 2 Lev. 12, 75.

2. Woodward *verſus* Cliff.

[Paſch. 2 W. & M. B. R.]

Teſtatum exiſtit is only recital. Poſt 589, 699. 2 Lev. 74, 75. 1 Saund. 273, 274. Cro. Eliz. 195. 2 Cro. 383, 537. Cro. Car. 188. 2 Leon. 64. 2 Jon. 229. 1 Sid. 375.

IN covenant, the plaintiff declared that he was ſeized in fee, and that by indenture made between the plaintiff and *Eliz.* his wife *ex una parte*, and the defendant of the other part, *teſtatum exiſtit* that the plaintiff and his wife demiſed. It was objected, that it being ſhewn that the huſband was ſole ſeiſed, the huſband and wife could not demiſe; *ſed non allocatur;* for it is not affirmed, but only that by the indenture it is witneſſed, for the *teſtatum* is a rehearſal of that.

3. Hall *verſus* Engleſtone.

[Mich. 8 Will. 3. B. R.]

Difference between time to plead on a habeas corpus and a capias. Ante, pl. 1. Poſt, p. 15. Vide 2 Wilſ. 393.

UPON a *habeas corpus* returnable in *Michaelmas* term, if the declaration be delivered before *craſtinum animarum*, the defendant muſt plead to try; but upon a *cepi corpus* he is only to plead to enter. So in *Eaſter* term, if the declaration be delivered before *menſ. Paſchæ*, the defendant on a *habeas corpus* muſt plead to try; upon a *cepi corpus* to enter only.

4. Anonymous.

[Mich. 8 Will. 3. B. R.]

IF a declaration be delivered againſt one in cuſtody, he ſhall have the whole term to plead in abatement.

5. Anonymous.

[Mich. 8 Will. 3. B. R.]

BEFORE joinder in demurrer, the defendant may waive his ſpecial plea, and plead the general iſſue; *per Cur.* But if there be a rule to plead, ſo as to ſtand by it, and the defendant pleads a ſpecial plea, as he may, and the plaintiff demurs, the plaintiff [*defendant*] ſhall not then waive and plead the general iſſue (*a*).

Waiver of ſpecial pleadings. Fareſt. 50.

(*a*) The defendant was refuſed the liberty to waive a ſham plea and plead the general iſſue, *Ellis* v. ——, 2 *Wilſ.* 369. So a ſpecial plea, after the intervention of a term, the plaintiff's only witneſs on the general iſſue having gone abroad ſince iſſue joined, *Freeman* v. *Jones*, 2 *Wilſ.* 391. If a defendant pleads a ſpecial plea, and is ruled to plead ſuch a plea as he will abide by; if he waives the ſpecial plea, he can only plead the general iſſue, *Hare* v. *Lloyd*, *Prout* v. *Dewar*, 1 *T. R.* 693.; but he may give notice of ſet-off, note *ibid.* In the Common Pleas the defendant muſt always abide by his plea, *Imp. C. B.* 308. *Cooper* v. *Mansfield.* The Court will give the defendant leave to withdraw the general iſſue, and plead it again with a ſpecial plea to let in the real merits, *Wilkes* v. *Wood*, 2 *Wilſ.* 204.

6. Pierce *verſus* Blake.

[Hill. 8 Will. 3. B. R.]

THE defendant pleaded a falſe plea in abatement, *viz.* that the plaintiff was dead; the Court was moved, that the attorney might be compelled to ſwear it. *Et per Holt*, C. J. We cannot compel him in any caſe to ſwear his plea, but where it is a foreign plea; but the attorney, if he puts in a falſe plea to delay juſtice, breaks his oath, and may be fined for putting a * deceit upon the Court. He remembered a caſe where judgment was given againſt a defendant above forty years of age, upon which judgment he brought a writ of error, and aſſigned infancy, and appearing by attorney for error, and the Court fined the attorney: In the principal caſe the Court ordered the attorney to plead immediately, ſo as he would ſtand by it; or the Court, if he did not, would inquire into the truth of the plea, and, if they found a deceit and a trick, they would fine him.

Attorney fined for aſſigning error notoriouſly falſe and frivolous. S. C. Holt 560. 1 Salk. 30, 20, 202. Lutw. Rep. 236. Styl. 225. Sid. 329. 1 Saund. 97, 98.

* [516]

Note; The Court will not order a man to plead peremptorily till the rules be out.

7. Brown *verſus* Corniſh.

[Paſch. 9 Will. 3. B. R. 1 Ld. Raym. 217. S. C.]

Onerari non debet proper only where there never was a charge.

INDEBITATUS aſſumpſit and *quantum meruit* for 20 *l.* The defendant pleaded *onerari non debet*, becauſe he paid the money at the time, *&c.*, *et hoc paratus eſt verificare*; the plaintiff demurred. *Et per Holt*, C. J. 1ſt, This plea does not amount to the general iſſue, becauſe it admits the cauſe of action (*a*). 2dly, *Onerari non debet* is no plea here, becauſe he allows the promiſe to be a good promiſe, but avoids it by matter of diſcharge *ex poſt facto*; in this caſe he ſhould have pleaded *actionem non*. But where the matter of the plea ſhews there never was a good cauſe of action, *onerari non debet* may be proper; thus in debt on a bond, defendant may plead *onerari non debet quia riens per deſcent*. 3dly, The plea was miſconcluded, for he ought to conclude to the country.

Vide 1 And. 20. Carth. 88.

(*a*) *Vide ante* 344. *Skin.* 362. *Cro. Eliz.* 262.

8. Aſhton *verſus* Sherman.

Mich. 9 Will. 3. B. R. *Vide* this Caſe, title *Executors*, pl. 10. page 298.

9. Anonymous.

[Mich. 9 Will. 3. B. R.]

Plea after judgment in ejectment.

IF judgment in ejectment be ſigned in a country cauſe for want of a plea, but no poſſeſſion delivered, a judge in his chamber, at any time before the aſſizes, may compel the plaintiff to accept a plea; but if poſſeſſion be delivered, he is without remedy; *per Holt*, C. J.

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10. Gray *verſus* Hart.

[Hill. 9 Will. 3. B. R.]

In juſtifying under a writ, it is not enough to ſhew where returnable, but muſt ſhew whence it iſſued. S. C. 2 Lutw. 1488. N. L. 470. Cro. Eliz. 504.

IN *aſſault and battery*, the defendant pleaded a writ to the ſheriff returnable in *C. B.*, and a warrant to him to arreſt the plaintiff, *&c.*, and did not ſhew from what court the writ iſſued; and it was held naught; for it might be a writ out of the King's Bench or the County Palatine, and they would not intend it a writ out of Chancery: So if *H.* plead a judgment, he muſt ſhew in what Court; for to put the adverſe party to ſearch in every court, would be infinite.

11. Anonymous.

[Mich. 10 Will. 3. B. R.]

THE Court reſented the number of frivolous ſham pleas which came before them, ſaying, it was againſt the duty of counſel, and againſt the ſtatute *W.* 1. *c.* 29., and that the old rule ought to be revived, *viz.* that counſel ſhould ſet their hands to the books delivered to the judges, which was anciently ſo ordered, that the Court might not be troubled with frivolous pleas.

Sham pleas.

Vide 2 Will. 369.

12. Paſmore *verſus* Serj. Goodwin.

[Trin. 11 W. 3. B. R.]

SERJEANT *Darnel* moved for an imparlance till the next term, becauſe the defendant was an officer of the court, and the bill was not filed againſt him, ſo as to give him eight days within term to plead; but the Court held, that the day of the bill filed is one day, ſo that the plaintiff may give rules that day; alſo they agreed, that Sundays and holidays are to be reckoned in: And the clerks ſaid it was ſufficient that he had four days in term, *quod Curia conceſſit*; Mr *Clark* ſaid, that anciently there were two rules given, both four-day rules; the firſt was *ad reſpondendum*, the ſecond *ad reſpondendum peremptorie*, which two were now turned into one eight-days rule (*a*).

Upon bills filed againſt officers it is ſufficient, if there be four days within term to plead. Vide ante, pl. 1, &c. ib. Comberb 19, 251, 253. Fareſt. 62. Str. 86.

(*a*) It is now only four days incluſive, 2 *Str.* 1192.

13. Anonymous.

[Trin. 11 Will. 3. B. R.]

THE queſtion was, Whether there ought to be new rules to plead upon an amendment? *Pew*, clerk of the papers, ſaid, that if the plea was of another term, there ought to be new rules; otherwiſe if it be a plea of the ſame term, becauſe there is a rule to warrant the judgment. *Holt*, C. J. Anciently they did not plead *de novo* after an amendment; therefore giving rules to plead again, cannot be the ancient courſe; becauſe the practice of pleading *de novo* is but of late introduced, but with great reaſon: When the plaintiff amends and gives an imparlance, there ſhould be new rules; otherwiſe not.

See 1 Salk. 47. *Information amended after plea pleaded. Quer.*

No new rules to plead after an amendment, unleſs an imparlance be given. Poſt. pl. 20.

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14. Wood *verſus* Cleveland.

[Paſch. 12 Will. 3. B. R.]

Judgment ſet aſide though ſtrictly regular, in order to try the merits. Vide 6 Mod. 191, 241. 1 Salk. 396, 401. 1 Mod. 1. Farreſl. 3. 1 Rol. Abr. 774. pl. 1. Cro. Car. 443. Hob. 104. S. C. Holt 560.

IN a common *action of treſpaſs*, the plaintiff ſigned his judgment for want of a plea; the defendant after term, and before the aſſizes, offered him a ſpecial plea, or to plead the general iſſue, provided the plaintiff would conſent to enter into a rule, that he ſhould at the trial be allowed to give ſpecial matter in evidence; the plaintiff refuſed, and executed a writ of inquiry. And now Sir *Bartholomew Shower* moved, that upon paying coſts the judgment might be ſet aſide, and the plaintiff obliged to accept their plea and go to trial, the plea being fair and containing ſpecial matter of title. The motion was granted; for *per Holt*, C. J. where the defendant's plea was a fair plea, and no delay affected, we will interpoſe; otherwiſe where a plea contains ſpecial matter that is queſtionable, and was deſigned to draw the plaintiff to demur.

15. Anonymous.

[Trin. 12 Will. 3. B. R.]

Str. 813. Barnes 242 1 Bur. 568. How the defendant ſhall plead after a voluntary appearance.

THERE was a queſtion, If a man appears voluntarily before *menſem Paſchæ* in *Euſter* term, whether he be obliged to plead to enter? Sir *Samuel Aſtry* and Mr. *Clark* were of opinion he was not. But *per Holt*, C. J. There is no difference between a voluntary appearance and an appearance upon a *capi corpus;* for a voluntary appearance is not good, unleſs a writ hath been taken out: And there is no reaſon for it; for if the plaintiff be content with a voluntary appearance in caſe of the defendant, there is no reaſon why the plaintiff ſhould be in a worſe condition than if he had arreſted him. Let the rule be, if a writ be taken out, and the defendant agrees to appear, he ſhall appear and plead according to the return of the writ, and if the return be before *menſem Paſchæ*, he ſhall plead to enter; but if no writ were taken out, he ſhall not be obliged to appear; but if a writ were taken out returnable after *menſem Paſchæ*, he ſhall have an imparlance till next term.

Vide ante, pl. 1 and 3.

16. Peirce *verſus* Paxton.

Vide ante 508. 2 Lev. 212.

[Trin. 13 Will. 3. B. R. 1 Ld. Raym. 691. S. C.]

IN *debt on a bond*, the defendant *puis darrein continuance* pleaded payment of part, and an acquittance in abatement. Upon demurrer, *Holt*, C. J. held it a plea in bar, and not in abatement. *Vide* 3 *Cro.* 342. *Al.* 63, 65. 3 *Cro.* 157. What is a bar before the action brought, is as much a bar after, for time makes no difference in the nature of the thing. *Vide* 7 *E.* 4. 15. *Sty.* 212. is a dark caſe. Entry into part differs; for that is without the conſent of the plaintiff [*defendant*]. But the plea is not good, becauſe the acquittance is a deed, and ought to be pleaded with a *profert* (*a*). Judgment to anſwer after.

Payment of part, and acquittance pleaded puis darrein continuance is in bar. S. C. Caſes B. R. 541. Holt 560. Vide 3 Lev. 230. Lutw. 1177, 1142. 5 Mod. 12.

(*a*) This is aided, except upon ſpecial demurrer, 4 and 5 *Ann.* c. 16.

17. Anonymous.

[Trin. 13 Will. 3. B. R.]

IF an act of parliament makes writing neceſſary to a common law matter, where it was not neceſſary by the common law, you need not plead the thing to be in writing, but give it in evidence, but where a thing is originally made by act of parliament, and required to be in writing, you muſt plead it with all the circumſtances required by the act; as upon the ſtatute of *H.* 8. of wills, you muſt plead a will to be in writing; but a collateral promiſe, which is required to be in writing by the ſtatute of frauds, you need not plead to be in writing, though you muſt prove it ſo in evidence (*a*). *Per Holt*, C. J.

Where a ſtatute creates a new thing in writing, it muſt be ſo pleaded; but where it only adds it to a common law matter, it needs not be ſet forth in a declaration, but in a plea it muſt. Raym. 450. Lutw. 1425. 1 Sid. 142. Bull. N. P. 279.

1 Lev. 81. Cro. Eliz. 438.

(*a*) In *Villars* v. *Handley*, 2 *Wilſ.* 49. a plea that an heir had nothing but the reverſion expectant on a term of 500 years commencing *anno* 1746, was held ill; becauſe it did not ſtate the term to be created in writing, [the report ſays *by deed*,] according to the ſtatute of frauds. But this caſe does not appear to have been cited.

18. Anonymous.

[Trin. 13 Will. 3. B. R.]

IF a man pleads over, he ſhall never take advantage of any ſlip committed in the pleading of the other ſide, which he could not take advantage of upon a general demurrer. *Per Holt*, C. J. *See* 6 *Mod.* 136.

Nothing can be taken advantage of on a plea over which could not on a general demurrer. Vide 8 Co. 120. b.

3 Wilſ. 297.

19. Anonymous.

[Trin. 1 Ann. B. R.]

After bail-bond forfeited, defendant cannot plead in abatement in the original action.

IF a man has forfeited his bail-bond, and ſo is in *miſericordia*, and the Court in favour of him ſtay proceedings thereupon, he cannot afterwards plead in abatement to the original action, but muſt plead in chief.

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20. Anonymous.

[Mich. 2 Ann. B. R.]

Amendment. Ante, pl. 13.

BY the courſe of the Court, if the plaintiff moves to amend his declaration the ſame term the defendant's plea comes in, the plaintiff need not give new rules to plead; but the defendant muſt plead in convenient time.

Vide 2 Bl. Rep. 785.

1 Salk. 47.

21. Anonymous.

[Mich. 2 Ann. B. R.]

Reaſon of amendment while in paper.

SINCE pleading in paper is now introduced inſtead of the old way of pleading *ore tenus* at the bar; it is but reaſonable after a plea to iſſue, or demurrer joined, that upon payment of coſts the parties ſhould have liberty to amend their plea, or to waive their plea or demurrer while all the proceedings are in paper.

S C 1 Salk. 208. 6 Mod. 157, 197. Ante 208.

22. Fanſhaw *verſus* Morriſon.

[Paſch. 4 Ann. B. R. 2 Ld. Raym. 1138. S. C. with other points.]

Scire facias upon a recognizance of bail in error. See 6 Mod. 159. 1 Saund. 3, 6. 2 Lev. 7.

SCIRE *facias* upon a recognizance entered before a judge of the Common Pleas, upon a writ of error of a judgment given in that Court in debt, conditioned that if the plaintiff ſhould be nonſuit, the writ of error diſcontinued, or judgment affirmed, that then he ſhould pay, *&c.* The defendant prayed *oyer*, and pleaded that the plaintiff in error did proſecute the writ of error, and aſſigned errors, *et quod placitum ſuper prædict. breve de errore adhuc pendet indeterminat'*, *&c.* The plaintiff replied, that the judgment was affirmed, *abſque hoc quod placitum pendet indeterminat'*, *&c.* The defendant demurred, and judgment was given for the plaintiff in *C. B.*, and now upon a writ of error, the Court held, that where a man pleads a performance, he ought to plead it in the words of the condition

Performance muſt be pleaded in the words of the condition; otherwiſe of excuſe. Lutw. 419, 420, 471, &c. 3 Lev. 245.

condition of the bond. 3 *Lev.* 293. 2 *Ven.* 221. *Dy.* 243. but otherwiſe where he pleads an excuſe; and that the defendant's plea is an excuſe in this caſe, and therefore it was not neceſſary to plead that the plaintiff in the writ of error was not nonſuit, nor the writ diſcontinued, nor the judgment affirmed; but that errors were aſſigned, & *placit. inde pendet indeterminat.*.

1 Lev. 145, 303. Negative plea need not conclude prout patet per record. 3 Lev. 152, 311. 5 Mod. 8. 1 Lev. 54, 212. 1 Lutw. 111, 207, 264. Fareſt. 106.

2dly, The Court held this plea was in the negative, and therefore there was no occaſion for the defendant to conclude with a *prout patet per recordum:* But the plaintiff ought upon this plea to have replied, that the record was certified in *B. R.* ſuch a term, *Et quòd ſuperinde talit. proceſſ. fuit quod judicium affirmat. fuit prout patet per recordum;* to which, if it was not ſo, the defendant might rejoin *nul tiel record.*

2 Lev. 190, 197.

2 Rol. Abr. 275.

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3dly, The Court held the replication naught; 1ſt, Becauſe it makes that matter of inducement which ſhould have been the point in iſſue; and, 2dly, Becauſe the traverſe puts a matter of record in iſſue to be tried by the country. And upon this the Court were going to reverſe the judgment, but an exception was ſtarted to the writ of error, for which it was quaſhed (*a*).

Traverſe that puts matter of record in iſſue to the country, is ill. Raym. 50. Vid. 1 Saund. 20, 99. Lutw. 633, 1138, and Hutteler verſus Raines, ib. 1401. 1 Lev. 193.

(*a*) *Note*; It appears by the report in Lord *Raymond*, that the reaſon of the writ being quaſhed was, that it was a writ of Q. *Anne*'s time, reciting judgment *ſuper quoddam breve* noſtrum *de ſci. fa.*, whereas the judgment appeared by the record to have been given in the reign of King *William*.

23. Domina Regina *verſus* Rawlins. Mich. 3 Ann. B. R. *Vide* this Caſe, title *Imparlance*, pl. 3. ante 367. *When the defendant ought to plead to an information.*

24. Turner *verſus* Beale.

[Paſch. 5 Ann. B. R. 2 Ld. Raym. 1262. S. C. Pleadings, 3 Ld. Raym. 350.]

IN *aſſumpſit*, the defendant *cognovit actionem*; but in bar of execution as to his perſon, apparel, bedding, tools, &c. pleaded 2 & 3 *Ann. c.* 16., and ſhewed that he was actually a priſoner in the *Marſhalſea*, and that being there at the ſuit of *ann*, he was *debito modo* diſcharged by the juſtices at ſuch a ſeſſions, *juxta formam ſtatuti*. To this it was demurred; and inſiſted, that it did not appear that he petitioned; and the juſtices ought not to aſſume a juriſdiction and diſcharge priſoners without ſeeking, or whether

Plea upon the ſtatute for diſcharge of poor priſoners, ought to ſhew all qualifications and circumſtances to bring the defendant within the act. Vide ante 345, 506. Mod. Caſes 22, 301. S. C. Holt 565, 566.

ther they will or not; and the defendant ought to ſhew his qualifications, and that he is within the benefit of the act, and it ought not to be put upon the plaintiff, who is a ſtranger, to ſhew that he was not qualified. Mr. *Eyre contra* urged, that all was aided by *juxta formam ſtatuti*. *Vide* 1 *Cro.* 314. 2 *Cro.* 609. *Holt*, C. J. The ſeſſions cannot intermeddle, but upon application: You muſt ſhew your diſcharge, and that it was regular and not deficient; the plaintiff is a ſtranger, and it is not to come on his ſide that the diſcharge was deficient, but you muſt ſhew the whole matter, and give him an opportunity to traverſe it. Judgment for the plaintiff.

Vide Plowd. 376. b Litt. 162. 4 Mod. 47. Sav. 58. 3 T. R. 636.

25. Woodrington *verſus* Deverill.

[Hill. 5 Ann. B. R.]

S. C. Holt 567. Vide ante 441. Dr. & St. 130. Bro. Attachment, 20. 4 Co. 32, 58, &c. infra.

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AFTERWARDS, *Hill.* 5 *Ann.*, *inter Woodrington* and *Deverill*, in debt on a bond, the ſame caſe happened as before, and then the caſe laſt mentioned was remembered, and without pretending to make good the plea in form, the ſtatute of amendment of the law, 4 & 5 *Ann. c.* 16., was inſiſted on, *viz.* that judgment ſhall be given as the right appears, *&c.* *Pengelly* for the plaintiff ſaid, that here appeared no ſufficient diſcharge, but a good cauſe of action for the plaintiff. *Powell*, J. ſaid, that act did not help ſubſtance; that if this ſort of pleading be made good, the Court can never know when particular juriſdictions act with authority, and when not; *quod Holt*, C. J. *conceſſit*, ſaying, this expoſition was to take the party's iſſue from him.

Pledge and Bailment.

Anonymous.

[Paſch. 5 W. & M. B. R. 2 Ld. Raym. 912, 913, &c.]

Pawn-broker, ante 379. contra.

IF a pawn-broker refuſes, upon tender of the money, to re-deliver the goods pledged, he may be indicted; for being ſecretly pawned, it may be impoſſible to prove a delivery in trover, for want of witneſſes. *Per Holt*, C. J. and *Eyre*, J.

Vadium,

Vadium, a pawn or pledge. In this caſe the pawnee hath a property, for the thing is a ſecurity to the pawnee that he ſhall be repaid his debt, and to compel the pawner to pay it. Pawn, quid. Lit. Rep. 332. Keilw. 82.

Now, if the pawn be ſomewhat that will be the worſe for wearing, as clothes, &c., the pawnee cannot uſe it. And how to be demeaned.

But if it be ſomewhat that will not be the worſe for wearing, &c., as jewels, &c., the pawnee may uſe them, but then it muſt be at peril; for if the pawnee is robbed in wearing them, he is anſwerable; and the reaſon is, becauſe the pawn is ſo far in the nature of a *depoſitum*, that it cannot be uſed but at the peril of the pawnee; and the uſing occaſioned the loſs. *Vide Owen* 423. But if the pawn is laid up, and the pawnee is robbed, the pawnee is not anſwerable. 4 Co. 31, 38. Co. Lit. 89. Yelv. 178. Owen 124. 2 Cro. 224.

Alſo, if the pawn be of ſuch a nature, that the keeping is of charge to the pawnee, as if it be a cow or a horſe, the pawnee may milk the cow or ride the horſe; and this is in recompence of the keeping.

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If a creditor takes a pawn, he is bound to reſtore it upon payment of the debt; but if his care in keeping it be exact, and the pawn is loſt, he ſhall be excuſed, for there is no default in him. 4 Co. 38. Yelv. 178. Co. Lit. 89.

And in caſe the pawn be loſt, the pawnee hath ſtill his remedy for the money againſt the pawner; for the law requires nothing extraordinary of the pawnee, but only that he ſhall uſe an ordinary care for the reſtoring the goods. Vide Str. 910.

If a pawn therefore be loſt before tender, the pawnee is not liable, unleſs there be default in him; but if after tender the pawnee keeps the goods, and they are ſtolen, the pawnee muſt anſwer; for now his property is determined, and he is a wrongful detainer; and he that keeps goods by wrong muſt anſwer for them at peril, in all events; for his detainer is the reaſon of the loſs. Delivered *per Holt*, C. J. in the caſe of *Coggs* and *Bernard* (a). *Trin.* 2 *Anne B. R.* Lit. Rep. [illegible]. Owen. 124.

(a) *Vide* the principal point in this caſe, 1 *Salk.* 26., the very elaborate and celebrated argument of Lord Chief Juſtice *Holt*, in Ld. *Raymond*, *ubi ſupra*, and Sir *Wm. Jones*'s Treatiſe on Bailments. *Per* Lord *Kenyon*, *Hil.* 33 *G.* 3., *Coggs* and *Bernard*, is a caſe of the very firſt authority.

Poor, Poor's Rates, Vagrants, &c.

Vide titles *Orders, Seſſions.*

1. *Inter* The Inhabitants of the Pariſh of Talborn *and* Boſton.

[Mich. 7 Will. 3. B. R.]

Taxation only without payment makes no ſettlement. Vide ante 478. pl. 21. Poſt 534, 536. 1 Show. 12. Comb. 282. Set. and Rem. 279. S. C. Vide Skin. 620. Foley 128.

IT was held, that if a man is taxed, and after taxation ſtays in the pariſh forty days without giving notice, it is no ſettlement within the new ſtatute unleſs he pays the tax; for it muſt be *taxing and paying*, and not *taxing* only, that makes a ſettlement, and is equivalent to a notice in writing.

[524] ## 2. *Inter* The Pariſhes of Ryſlip *and* Harrow.

[Hill. 8 Will. 3. B. R.]

Living in a pariſh where H. has land, gains a ſettlement. Vide ante & poſt 534, 536. 5 Mod. 419. Set. and Rem. 224. S. C. Vide Str. 476. 2 Seſſ. Ca. 211. Str. 1176. 2 Seſſ. Ca. 400.

PER Holt, C. J. Having land in a pariſh will not make a ſettlement, but living in a pariſh (*a*) where one has land will gain a ſettlement without notice; for the act of parliament never meant to baniſh men from the enjoyment of their own lands, and the law takes notice of freeholders, as thoſe that chuſe members of parliament, and are jurors. Alſo boarding as a ſcholar gains no ſettlement, no more than being nurſed in a pariſh.

Bur. Set. Caſ. 307.

(*a*) *R.* That the reſidence need not be on the eſtate, provided it is within the pariſh, *Bur. S. C.* 125.

3. *The Caſe of* The Pariſh of Shoreditch.

[Mich. 10 W. 3. B. R.]

Juſtices may quaſh the whole rate where the rate is unequal,

AN order of ſeſſions was made for quaſhing a poors rate for the pariſh of *Shoreditch*. Exception was taken, that by the ſtatute of 43 *Eliz.*, the juſtices could not quaſh the

the whole rate, but were to relieve the parties grieved. *Sed per Cur.* If a rate be burthenſome to a whole ſet of men, as in this caſe it was to landholders, the beſt way is to quaſh the whole rate; and the Chief Juſtice held, that if the juſtices quaſh this, they may make a new one themſelves, but they are not bound to do it, but may order the ancient inhabitants to do it (*a*).

and make, or order to be made, a new one. Vide ante pag. 484, and poſt pl. 5, and 17. Carth. 464 S. C. Holt 508, 573. Vi. 5 Bur. 2634.

(*a*) *Vide* note to the caſe of the pariſh of St. *Leon, Shoreditch, ante* 483.

4. *Inter* The Inhabitants of the Pariſh of Harrow *and* Ryſlip (*b*).

[Mich. 10 Will. 3. B. R.]

A. Comes into *Harrow*, and, being likely to become chargeable, was removed to *Ryſlip*; *Ryſlip* appealed; and upon the appeal, *A.* was adjudged to be ſettled at *Ryſlip*: Afterwards *Ryſlip* diſcovered that *Hendon* was the place of his laſt legal ſettlement, and ſent him thither; and the queſtion was, Whether, after the adjudication upon the appeal, *Ryſlip* was not eſtopped againſt all the world to ſay, that *Ryſlip* was not the place of his laſt legal ſettlement? *Et per Holt*, C. J. *Ryſlip* is eſtopped to ſay otherwiſe; for if *Ryſlip* had not been the very place of his laſt legal ſettlement, the juſtices muſt have ſent him back to *Harrow*, who were firſt poſſeſſed of him, for that reaſon, becauſe they were poſſeſſed of him, and he did not belong to *Ryſlip*. And now this is in effect the ſame queſtion again, *viz.* Whether he belongs to *Ryſlip?* which queſtion has been already determined by the juſtices on the appeal, who have adjudged that he was laſt ſettled at *Ryſlip*. Now this point being determined, the appeal muſt be final and concluſive, otherwiſe there would be no end of things; and the rather as to *Ryſlip*, 1ſt, Becauſe *Ryſlip* was party to the ſuit wherein this determination was made, and yet *H.* may be eſtopped where he is not party to a ſuit; *per Holt*, C. J. who remembered the caſe of *Thornton* and *Pickering*, where it was adjudged, that if *H.* be adjudged by two juſtices to be the father of a baſtard child, he is eſtopped as to all mankind to ſay the contrary, and any man may call him ſo at his pleaſure. The caſe was, A libel was exhibited in the eccleſiaſtical court for ſaying he had a baſtard, and the defendant ſuggeſted for a prohibition this adjudication by the two juſtices; and the ſuggeſtion being turned into a declaration in an attachment on the prohibition, the defendant pleaded to it, that the

Confirmation upon appeal is final againſt all pariſhes, otherwiſe of reverſal. Vide ante pag. 486. pl. 45, &c. ib. & poſt pag. 527. 1 Vent. 310. Vide ante 492. 5 Mod. 416, 417. Set. and Rem. 184. S. C.

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(*b*) Q. If this caſe ſhould not be intitled *Hendon* and *Ryſlip?*

words were ſpoken at large, without any relation to the adjudication by the juſtices. Plaintiff replied, and prayed judgment if he ſhould not be eſtopped by the adjudication to ſay he had not a baſtard.

2 Mod. 72. 10 Co. 10°. 6 Mod. 287.

Afterwards, *Hill.* 10., this was moved again, and the *Holt* and *Gould* held the adjudication was final as to *Ryſlip* againſt all perſons and places, becauſe the point of his ſettlement as to *Ryſlip* was tried in the appeal; but as to *Harrow*, (for he had been formerly removed by them to *Hendon*, and that order reverſed,) they were at liberty to ſend him to any other place, and were not eſtopped; because the juſtices on the appeal did not adjudge him to be ſettled at *Harrow*, though they adjudged him now to be ſettled at *Ryſlip*, ſo that the other point was not tried *Turton* and *Rokeby contra*. *Adjournatur*.

Ante 476.

5. Anonymous.

[Hill. 10 Will. 3. B. R.]

A mandamus to compel precedent overſeers to come to an account with the preſent quaſhed. Vide ante 484, and 524. Poſt, pl. 19, and 20. 5 Mod. 179, 420, 421. 6 Mod. 77, 97, 98.

A *Mandamus* was granted to the juſtices of peace on 43 *Eliz.*, commanding them to compel the precedent overſeers of the poor of the pariſh of *A.* to come to an account with the preſent overſeers, and this writ was now quaſhed: 1ſt, For that the account by 43 *Eliz.* is to be given to two juſtices, and not to the ſucceeding overſeers (*a*). 2dly, Two of the perſons named in the writ whom the juſtices were to compel to come to account, did not appear to have been overſeers.

(*a*) *Vide* ſtat. 17 *G.* 2. *c.* 38.

6. *Inter* The Pariſhes of Beckenham *and* Camberwell.

[Trin. 5 Will. 3. B. R.]

Unmarried perſon hired for a year. Sect. and Rem. 180. S. C. [526] Vide poſt, pl. 11. and pl. 13.

A Queſtion was made upon 8 & 9 *W.* 3. *c.* 3., which enacts, that an unmarried perſon, hired for a year, ſhall not be ſettled, unleſs he ſerves the whole year, whether that extended only to caſes that might happen after the act, or to ſuch alſo as had happened? *Et per Cur.* The act ſuch only as may happen after the act: It can have no retroſpect, but declares a law for the future, notwithſtanding the words *declared and enacted*. Adjudged upon a ſpecial order.

7. Anonymous.

[Hill. 11 Will. 3. B. R.]

IF *H.*, being ſettled at *A.*, becomes afterwards a vagrant, ſome juſtices have thought that to be a determination of the ſettlement; but I never could think ſo; for if *H.* be found a vagrant within 39 *Eliz. c.* 24., he may be ſent to the place of his birth; but then by 43 *Eliz. c.* 2. he may be ſent from thence as a poor perſon to the place of his laſt legal ſettlement; for his being ſent to the place of his birth, ſatisfies the ſtatute of 39 *Eliz.*, and ſo both the ſtatutes ſtand together. *Per Holt*, C. J.

Vagrant to be ſent to the place of his birth, and from thence by order to the place of his ſettlement.

8. Dominus Rex *verſus* The Inhabitants of Audly.

[Mich. 12 Will. 3. B. R.]

AN order of ſeſſions made upon an appeal from a poor's rate, being removed into this court by *certiorari*, the caſe was, on *Sept.* 1, 1665, a certain rate was agreed to by the inhabitants of the pariſh of *Audly*, which had been followed ever ſince till the laſt year, when a new rate was made. Upon appeal to the ſeſſions the new rate was quaſhed, and the old one ordered to ſtand. And now it was objected, that it did not appear this was a poor's rate, being called a *pariſh-levy*, which might be as well for the church as the poor, and then the juſtices had no juriſdiction. *Darnel*, The Court will intend it. *Holt*, C. J. *Twiſden* uſed to ſay, If a particular juriſdiction does not ſhew the matter to be within its authority, it muſt be taken to be out of it. Mr. *Parker* took another exception, *viz.* that the whole rate could not be quaſhed at the complaint of one man; and alſo that the old rate, however juſt at firſt, might be unequal now, and therefore the juſtices could not make a ſtanding rate; which laſt *fuit conceſſum per Holt*, C. J. for lands may be improved. By 43 *Eliz.* the rate muſt be equal; *ergo* it ought to be continually altered, as circumſtances alter. The juſtices could not confirm an old rate, and in this their order is nought. And by him it was ſaid in this caſe, that though the juſtices at ſeſſions need not give a reaſon for their order, yet if they give a reaſon which is wrong, we muſt be guided by it, and quaſh the order, becauſe it appears to us to be no reaſon.

A ſtanding rate cannot be made, but muſt be varied by circumſtances. Holt 576. S. C.

9. *Inter* The Inhabitants of Mynton *and* Stony Stratford.

[Mich. 13 Will. 3. B. R.]

Reverſal on appeal is final only between the parties, but confirmation is concluſive againſt all the world. Vi. ante, p. 486, &c lb. & p. 524. 1 Vent. 310. Vide ante 412, 524. 5 Mod. 417. 6 Mod. 259, 267. Caſes B. R. 668. S. C. 3 Salk 260. Set. and Rem. 228. Holt 577.

BY order of the juſtices a poor perſon was ſent to *Mynton*: *Mynton* appealed to the ſeſſions, and the order was diſcharged; and then by order the perſon was ſent to *Stony Stratford*, who appealed, and the order was confirmed; and then by another order the perſon was ſent back to *Mynton*. *Et per Curiam*, The laſt order to ſend him to *Mynton* was illegal. *Per Holt*, C. J., If on appeal to the ſeſſions an order be diſcharged, that judgment binds only between the parties. But when upon an appeal an order is confirmed, that is concluſive to all perſons as well as to the parties, for it is an adjudication that this is the place of the party's laſt legal ſettlement, which cannot be avoided by the pariſh againſt whom it is made. It was alſo held, that a pariſh in reputation is liable, if there be officers, i. *e.* churchwardens.

10. Anonymous.

[Paſch. 1 Ann. B. R.]

Hoſpital lands are chargeable to the poor. Vide Cowp. 83. Cald. 153. 4 Bur. 2455.

HOSPITAL *lands* are chargeable to the poor as well as others; for no man, by appropriating his lands to an hoſpital, can diſcharge or exempt them from taxes to which they were ſubject before, and throw a greater burden upon their neighbours. *Per Holt*, C. J. (*a*)

(*a*) *R.* 2 *Bur.* 1064. That St. *Luke*'s Hoſpital for poor lunatics was not rateable, as the rate muſt either be made upon the truſtees, who were merely nominal; the ſervants, who were merely hired attendants, and had no poſſeſſory right or intereſt; or upon the objects of the charity; any of which caſes would be abſurd. And there being no perſon rateable, it was held by neceſſary conſequence that there could be no rate. *Vide* alſo 4 *Bur.* 2439.

Poſt, pl 13. S. C. Set. and Rem 181. Holt 577.

11. *Inter* The Pariſhes of Farringdon in Berks *and* Witty in Oxfordſhire.

[Paſch. 1 Ann. B. R.]

Unmarried perſon hired for a year, marrying before the year is expired, cannot be removed, and performing the

A Servant came into the pariſh of *S.* was hired for a year, and having ſerved half a year of the time, married a woman in the pariſh of *Witty*; and the queſtion was, 1ſt, Whether the juſtices, on complaint of the churchwardens, could make an order to remove him to the

the place of his laſt legal ſettlement? 2dly, Whether his ſerving here would not gain a ſettlement? To the firſt point it was admitted, that the contract between the maſter and ſervant was not diſſolved by the marriage; and that, admitting it might be diſſolved by an order made on complaint of the maſter (*a*), yet, without that, and upon complaint of the officers only, it could not be diſſolved; therefore *Broderick* (of counſel) admitted that the juſtices could not in the principal caſe ſo remove him, as that he could not come to ſerve his maſter, but held he might be removed, ſo as that the order ſhould diſturb him, and prevent a ſettlement; and this he ſaid was a *medium* that would neither prejudice the contract, nor evade the ſtatute. He compared it to an order to remove on 14 *Car.* 2. before forty days ſtay; in which caſe the very making of the order obſtructed a ſettlement; and it may be executed after the forty days. *Holt*, C. J. and *Powell contra*, That an order to diſturb him and not remove him, was not within the meaning of the act; diſturbing him, without power to remove, is vain; and this does not unſettle, nor is it like the caſe of forty days. 2dly, It was queſtioned, Whether ſuch a ſtay, &c. would gain a ſettlement; becauſe the ſtatute make the party's being unmarried a qualification as well as his ſtay, *viz.* If any ſuch perſon, *being unmarried, being hired, &c. ſuch ſervice, &c.* So that the words *ſuch ſervice* goes to all, not only the ſtay, but the ſtate of the party. To this *Powell* inclined; *Holt*, C. J. *contra*, *Such* is only *ſuch ſervice*, and the marriage does not hinder the ſervice; the contract continues; and ſuppoſe the woman he marries be of the ſame pariſh, ſhall not that gain a ſettlement?

ſervice, gains a ſettlement. Vide ante, pl. 6. 3 T. R. 382. Poſt, pl. 13. 2 Bur. S. C. 455. 1 Fol. 148. Seſſ. Ca. 133.

[528]

(*a*) *R. Bur. S. C.* 322. That a juſtice cannot, on complaint of a maſter, diſcharge a ſervant for marrying.

12. *Inter* The Inhabitants of the Pariſhes of Cumner *and* Milton in the County of Berks.

[Trin. 2 Ann. B. R. S. C. Forteſc. 322.]

UPON a ſpecial order of ſeſſions, the caſe was, *H.* was ſettled at *Cumner*, and had ſeveral children born there: Afterwards he removed to *Milton*, and gained a ſettlement there, by renting a tenement of the value of 10*l. per annum*. He became poor, and his children, under the age of ſeven years, were ſent back to *Cumner*, by order of two juſtices, which was confirmed at the ſeſſions. *Powell*, J. held, that when a child is ſent with the parents by reaſon of nurture, it gains no ſettlement; but here the

Father ſettled at A. removes to B. with his children, and gains a new ſettlement there, and ſo do the children, though under the age of ſeven years. Vide ante 427, 470. Comb. 380, 381. 3 Salk. 251.

S. C. 6 Mod. 87. Holt 578. Set. and Rem. 239, 242.

children did not come to *Milton* by order. The children's ſettlement ſhall not be divided from the father, for that would be unnatural. When a man gains a ſettlement for himſelf, his wife, and ſervants, he ſhall gain a ſettlement for his children alſo; but if a widow, having children under the age of ſeven years, marries a man of another pariſh, the children ſhall go with the mother for nurture, but after ſeven years of age they ſhall be ſent back to the pariſh where their father was ſettled, for ſhe cannot gain a ſettlement for them in this laſt pariſh, being under coverture, and having a ſettlement there herſelf only as part of her huſband's family, from whom ſhe cannot be ſevered (*a*). *Holt*, C. J. Birth is a ſettlement, and the firſt ſettlement; and there muſt be another ſecond ſettlement by forty days, *&c.*, to alter the primary ſettlement. A child under the age of ſeven years is accounted a nurſe-child. If a child be put out to nurſe, or for education, though it be above ſeven years old, it gains no ſettlement thereby, as it was held in Sir *Paul Jenkinſon*'s caſe. The queſtion here is, Whether the firſt ſettlement by birth be altered? It is hard, I confeſs, to remove the child from the father. *Gould*, J. The child may be removed after the age of ſeven years, but not before; he is ſent with his father for nurture only. *Holt*, C. J. Suppoſe the father and mother come to *A.*, and then go to the pariſh of *B.*, and within forty days the mother be delivered of a child; the child, though legitimate, ſhall be ſettled where it was born. The principal caſe is fit to be well conſidered; the father indeed ought to maintain his children, but the queſtion is, Whether the children, by living with the father, gain a ſettlement? The juſtices cannot remove the children from the father till he fall to decay. Afterwards this was moved again. *Et per Holt*, C. J. The queſtion is, When the father comes with his children to *Milton*, and gains a ſettlement there, whether that does not alſo give a new ſettlement to his children, and unſettle them as to *Cumner*, the place of their birth? If a father be ſettled and die, his wife being big with child, and after that the mother dies before ſhe is delivered, and afterwards the child is born, the child is ſettled there by his birth (*b*). In this caſe the ſettlement of the father at *Milton*, is a ſettlement to the children. The child is ſettled by birth only, where it is an accidental ſettlement (*c*). The order was quaſhed (*d*).

[529]

(*a*) *R. acc. Carth.* 449. 2 *Bott.* 3d edit. 34.

(*b*) *Rex* v. *Clifton*, 19 *Vin* 382. If the father die before the child is born, yet the child ſhall be ſettled where the father was ſettled before his death.

(*c*) *Vide Foley* 313.

(*d*) *R. acc. Foley* 257. *And.* 345. *Vide Set.* and *Rem.* 17. *Str.* 580. Ld. *Raym.* 1474.

13. *Inter* The Pariſhes of Farringdon *and* Wilcot.

Ante, pl. 11. S. C.

[Paſch. 2 Ann. B. R.]

H. Being ſingle, was hired for a year; after he had ſerved three quarters of the year, he married, and the juſtices removed him to his place of laſt legal ſettlement. *Et per Cur.* The contract being good, the juſtices have no power to remove him from his maſter before the end of the year; for they cannot annul the agreement between maſter and ſervant, unleſs it be upon complaint of the maſter (*a*). Settled or not ſettled, was not before the Court. But as to that, *viz.* whether ſuch perſon ſerving out the year would gain a ſettlement? *Holt* and *Gould* held, the word *unmarried* went only to the hiring (*b*). *Powell contra*, that it went to the whole ſervice, by reaſon of the word *ſuch*.

Unmarried perſon hired for a year, marrying before the year expired, but performing the ſervice, gains a ſettlement. Vide ante, pl. 6, and 11. S. C.

(*a*) Nor upon ſuch complaint, *Bur. Set. Ca.* 322.

(*b*) *R. acc. Foley* 148. *Seſſ. Ca.* 143.

14. *Inter* The Pariſhes of Little-Kire *and* Woolfall. [530]

[Trin. 2 Ann. B. R.]

A Pariſhioner of the pariſh of *A.* came to *B.* with a certificate, according to the late act of parliament; and the juſtices reciting that matter, and becauſe he was likely to become chargeable to *B.*, ſent him back to *A.* *Winnington* moved to quaſh the order, becauſe he is not removeable till he is actually chargeable by the expreſs words of the act 8 & 9 *W.* 3. *c.* 30. *Et per totam Curiam* the order was quaſhed, *niſi*. Mr. *Broderick* agreed the exception, but ſaid the reaſon of the removal was, becauſe the certificate was wrong, and that the ſeſſions have authority in this matter; for an appeal lies to them within the equity of 14 *Car.* 2., where a certificate is made and ſigned by two juſtices. *Powell*, J. *contra*, If there was a fault in the certificate, it ought to appear to be the reaſon why he was ſent back, and the juſtices at ſeſſions have not a juriſdiction by way of appeal upon ſuch a certificate.

Certificate-man is not removeable till actually chargeable. Vide infra.

Vi. 3 T. R. 49. Bur. S. C. 392. Sayer 287.

15. *Inter* The Inhabitants of Malden *and* Fletwick.

[Trin. 2 Ann. B. R.]

Order of removal of certificate-man muſt adjudge him to be actually chargeable, ut ſupra.

AN order was made reciting, That whereas complaint has been made unto us by the, *&c.*, that *J. S.*, who is lately come into the pariſh of, *&c.* with a certificate according to 8 & 9 *W.* 3., is actually chargeable to the pariſh, and quaſhed; for the juſtices muſt adjudge him to be chargeable, or at leaſt muſt ſay it appeared to them that he was ſo; but the juſtices need not adjudge the place that gives the certificate to be the place of his laſt legal ſettlement.

16. *Inter* The Pariſhes of All-Saints *and* St. Giles in Northampton.

[Trin. 1 Ann. B. R.]

Certificate concludes the pariſh giving it, only againſt the pariſh to which it is given. Vide poſt 535. Caſe of Honiton contra. Holt 578. S. C.

[531]

UPON an appeal a ſpecial order was made, and the caſe was; One was born at *A.* and came and lived at *B.* ſome years, but never gained any ſettlement there; then he removed to *C.* for convenience of getting his livelihood, and *B.* gave him a certificate according to the late act. The man became chargeable, and was ſent back to *B.*, who found that he was laſt legally ſettled at *A.*, and ſent him thither. *Et per Holt*, C. J. The reaſon of the act of parliament about certificates was only to encourage pariſhes where poor perſons were minded to go, to receive them; and therefore it enacts, that when the poor perſon ſhall be chargeable, the pariſh which gave the certificate ſhall receive and provide for him as a ſettled inhabitant, which words lay an obligation upon the pariſh which gave him the certificate to receive and provide for him againſt that pariſh which they gave the certificate to. But as to all other pariſhes, they are as they were before (*a*), for the concluſion is only by reaſon of the words of the act of parliament, which extend only to the pariſh to which he was ſent; by conſequence the concluſion can extend no farther. *Powell*, J. This way of giving certificates was a thing commonly practiſed before this act of parliament, and it was made only to oblige the pariſh who gave the certificate to receive him again of the other pariſh to which the certificate was given: But the intent of that was not to make a new ſettlement which was not before. But *per*

(*a*) *R. acc.* 4 *T. R.* 251. *Vide Say.* 231. *Bur. S. C.* 373, 381.

Holt,

Holt, C. J. Such certificate is a mighty evidence before the juſtices; and ſo is a demand and refuſal of a converſion, which yet being ſpecially found, will not be a converſion.

17. Tawny's *Caſe*.

[Hill. 2 Ann. B. R. 2 Ld. Raym. 1009. S. C.]

TAWNY being overſeer of the poor of *Little Port* in the iſle of *Ely*, laid out his money in the relief of the poor, and was turned out of his office by the juſtices, before the end of the year, by which means he loſt the opportunity of making a rate to reimburſe himſelf: Upon this he obtained a *mandamus* directed to the churchwardens and overſeers of the poor, to make a rate to reimburſe him; Mr. *Parker* and Mr. *Eyre* argued, that there could be no ſuch charge, neither by common law nor by the ſtatute 43 *Eliz.* *Et per Holt*, C. J. We cannot order the pariſh or overſeers by a *mandamus* to make a rate to raiſe money to reimburſe an overſeer, but only to raiſe money for the relief of the poor, nor can they make a rate otherwiſe (*a*): The act of parliament is expreſsly ſo, and muſt be purſued. An overſeer is not bound to lay out money till he has it; if he does, he muſt make a new rate for the relief of the poor, and out of that he may retain to pay himſelf: *Tawny* ſhould have done ſo; he truſted where he needed not have done it: he has not purſued the means the ſtatute gave him, and we cannot relieve him. *Et per tot. Curiam*, The *mandamus* lies not; *ideo caſſetur*. *Et nota per Cur.* The churchwardens and overſeers may make a rate of themſelves. *Weld* and *Page pro le mandamus*.

No mandamus lies to the overſeers to make a rate to reimburſe former overſeers Vide pag. 484. and ante pl. 5. 5 Mod. 179. 6 Mod. 97. S. C. 3 Salk. 232. Caſes L. E. 104. Holt 579. Rate muſt be for the relief of the poor. Ante pl. 3.

(*a*) *R. Doug.* 116. on the authority of this caſe, That a rate cannot be made to repay money borrowed to repair or rebuild a workhouſe. *Vide Foley* 10. 1 *Bott.* 3d edit. 272. *Foley* 33.

18. *Inter* The Pariſhes of Weſtbury *and* Coſton. [532]

[Hill. 2 Ann. B. R.]

A Woman big with child was removed by order of the juſtices from *Weſtbury* to *Coſton*, and, pending the order, before the next quarter-ſeſſions, ſhe was delivered of a baſtard-child. *Coſton* appealed, and thereupon the order of the two juſtices was reverſed; but the child was ſent back to *Coſton*, as the place of its birth. *Et per Holt*, C. J. Though here be no fraud, here was a wrongful removal,

Baſtard born at A. pending an order of removal from B. afterwards reverſed, is ſettled at B. Vide ante 427, 474, 485, and 528.

moval, and the reverſal makes all void *ab initio*. Fraud, or not fraud, is not material in this caſe; but the ſettlement of the child depends upon the removal, for if that was wrong, they ſhall not eaſe themſelves by it.

19. Tracy *verſus* Talbot.

[Trin. 3 Ann. *Coram* Holt, *C. J. at* niſi prius.]

Aſſeſſments for the poor ought to be raiſed monthly. 6 Mod. 214. S. C. 3 Salk. 260. Set. and Rem. 235. Holt 581.

H. Took part of a houſe in the pariſh of *D.* on the 3d day of *Decemb.*, and was rated as an inhabitant, and was diſtrained for a quarter's rate the *Chriſtmas* following; but the diſtreſs was taken before *Chriſtmas* on a general warrant made for the whole year; and in *replevin* upon evidence it was ruled *per Holt*, C. J. 1ſt, That if two ſeveral houſes are inhabited by ſeveral families, who make and have but one common avenue or entrance for both; yet in reſpect of their original, both houſes continue rateable ſeverally, for they were at firſt ſeveral houſes; and if one family goes, one houſe is vacant: But if one tenement be divided by a partition, and inhabited by different families, *viz.* the owner in one, and a ſtranger in another, theſe are ſeveral tenements ſeverally rateable, while they are thus ſeverally inhabited; but if the ſtranger and his family go away, it becomes one tenement. 2dly, That *H.* could not be rated for the whole quarter, for poor's rates are to be aſſeſſed monthly by the ſtatute; and by this means a man cannot move in the middle of a quarter, but he muſt be twice charged (*a*). 3dly, That *H.* could not be diſtrained by virtue of the general warrant made before the rate; but there ought to be a ſpecial warrant on purpoſe. 4thly, That a diſtreſs could not be taken for a quarter's rate before the quarter was ended (*b*); but the jury ſaid the cuſtom was otherwiſe.

(*a*) *Vide* 6 *Mod.* 97. 8 *Mod.* 10. 17 *G.* 2. *c.* 38. ſ. 12. 2 *Bur.* 1152. 2 *Bl. Rep.* 694. Stat. (*b*) *R. contr.* 1 *Bott.* 3d edit. 207.

[533]

20. Domina Regina *verſus* Hedges.

[Mich. 4 Ann. B. R.]

Upon appeal from allowance of overſeer's accounts, ſeſſions muſt execute their judgment in the ſame manner as two juſtices ought to

AN order was made at the quarter-ſeſſions upon appeal: The caſe was, *Hedges*, an overſeer of the poor, accounted before two juſtices, and this account was allowed; the pariſh appealed to the quarter-ſeſſions from this allowance, and they diſallowed the account, and ordered him to pay ſo much over, which they adjudged to be in his hands; and for not doing this, they committed him. Mr. *Eyre*

Eyre moved to quaſh this order, becauſe by 43 *Eliz. c.* 2. *ſect.* 4. they ſhould have levied the arrears by diſtreſs and ſale, and in default of diſtreſs have committed him: And the whole Court agreed, that the juſtices at the ſeſſions upon the appeal muſt execute their judgment in the ſame manner as the two juſtices muſt do, and that the two juſtices muſt have ſent their proceſs to diſtrain, and upon a return to that, that there was no diſtreſs, ſhould have committed him. Then *Darnel* moved that it might be only quaſhed as to this part; *quod fuit conceſſum per Cur.* Then Mr. *Eyre* objected to that, *viz.* that the firſt order, as recited in the order of appeal for the allowance of the account, was not by two juſtices *quorum unus; ſed non allocatur;* We cannot judge of that upon a recital, ſo as that you may take advantage of it; you muſt bring in that order by *certiorari.*

do. Vide ante 525. pl. 5, &c. ib. & 6 Mod. 77, 97.

Vide St. 17 G. 2. c. 38. ſ. 2.

21. *Inter* The Pariſhes of St. Bride's *and* St. Saviour's.

[Hill. 4 Ann. B. R.]

A Poor perſon was ſent from *St. Bride's* in *London* to *St. Saviour's* in *Southwark*, and upon an appeal a ſpecial order was made: The caſe was, *B.* was bound apprentice for four years to *J. S.* and lived out theſe four years at *St. Bride's* with him; *J. S.* was only a lodger and had no ſettlement there. And the Court held the apprentice was well ſettled in *St. Bride's*, for he was not a perſon removeable, nor does his ſettlement depend on his maſter, as that of a wife on her huſband for a ſettlement; but he gains a ſettlement for himſelf (*a*) within 14 *Car.* 2. by forty days inhabitation, and ſo of a hired ſervant; but the matter went off upon another exception.

Apprentice may gain a ſettlement, though the maſter has none. Ant. 497. pl. 28. S. C. Set. and Rem. 87.

(*a*) *R. acc. Foley* 150, 152. *Set.* and *Rem.* 65. 2 *Bott.* 3d edit. 564.

22. Jenkin's *Caſe.* [534]

[Paſch. 5 Ann. B. R.]

An order of ſeſſions was made, that the defendant ſhould pay 2*s. per* week towards the ſupport of his father, till that Court ſhould order the contrary; which was held good, becauſe it was indefinite and no ſet time limited; and if an eſtate happened to fall to him, they might apply to the juſtices; otherwiſe if a time was limited.

Order to relieve his father till ſeſſions order the contrary, good.

23. Domina Regina *verſus* the Inhabitants of Buckingham.

[Paſch. 5 Ann. B. R.]

Nothing makes a ſettlement within 3 & 4 W. & M. that is not within the very words. Vide ante 478, 523, 524. poſt 536. 1 Show. 12. Comber. 282. 5 Mod. 330, 331, 454. S. C. Holt 582. Set. and Rem. 143.

A Special order was made, wherein the caſe was; *H.* being a poor perſon went to *Buckingham*, where he took part of a houſe of *W. T.* at 3*l. per annum*, and inſiſted when he took this apartment, that he would pay no taxes for it, but that the leſſor ſhould; this was agreed to, his rent being the more and the greater upon that account: This appeared upon evidence, and alſo that this apartment before the taking, and while he continued in it, was diſtinct from the reſt of the houſe without communication, and was taxed as a houſe of itſelf, and that the tax was laid upon *W. T.* the leſſor; and that while *H.* lived there he took his freedom in the corporation, and once voted as a freeman at the election of bailiffs for the corporation. The juſtices at the quarter-ſeſſions adjudged this to be a good ſettlement: But upon the motion of ſerjeant *Broderick* it was quaſhed: He inſiſted that ſince the explanatory act 3 & 4 *W. & M.* nothing makes a ſettlement within that ſtatute that not comes within the words; an explanatory act implying a negative of any thing elſe. *Et per Holt*, C. J. and *Powell*, J. Coming into a pariſh, and being taxed by the pariſh, made a good ſettlement without a notice in writing, within the ſtatute *Jac.* 2. But the law is altered by 3 & 4 *W. & M.*, and as to his voting they could not take notice that that implied a ſettlement; for a bare reſidence might by the conſtitution of the corporation entitle him to that, and his voting was an act that related to the corporation, and not to the pariſh.

Foley 110, 123. Str. 835. 2 Bott. 3d ed. 125.

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24. *Inter* the Inhabitants of the Pariſh of Dunsfold *and* Ridgwick.

[Mich. 9 Ann. B. R.]

Two ſeveral hirings for half a year, and ſervice for a year, not ſufficient to gain a ſettlement. Black 191. S. C.

IT appeared by a ſpecial order, that one was hired as a ſervant to live at *Ridgwick* for half a year, and after that was hired again to live there for another half year with the ſame perſon, and thereupon ſerved a year in one continued entire ſervice, but by ſeveral hirings. Sir *Peter King* urged, that here was a ſervice for a year, and a hiring for a year, though by ſeveral contracts; and that the hiring need not be by one entire contract, and that ſo it had been held; and he cited a caſe where *H.* took a tenement of 5*l.* a year, and alſo another tenement of 5*l.* a year,

year, and occupied both, and this was held to be a renting of a tenement of 10*l. per annum. Et per Cur.* It ought to be one entire contract, and one entire service; the one is required by the ſtatute as well as the other. If a ſervice under ſeveral contracts ſhall gain a ſettlement, one that ſerves by the month, by the week, or by the day, may, if he continues a year, gain a ſettlement; one may hire by the day for charity; but there is danger of being chargeable in hiring ſuch a perſon by the year: For ſuch a term as a year it is not ſuppoſed a maſter would hire one, unleſs able of body, and ſo a perſon not likely to become chargeable. Alſo the Chief Juſtice obſerved, that by the ſtatute of *Eliz.*, the retainer of ſervants was for a year; that 14 *Car.* 2. requires forty days ſtay, and that this was inconvenient, for by gaining a ſettlement in forty days, ſervants grew inſolent; and that theſe latter acts, *viz.* 3 & 4 *W.* 3. *c.* 11., 8 & 9 *W.* 3. *c.* 30., do but turn the forty days ſervice into a year's ſervice, and the hiring to be a retainer for a year (*a*) according to the ſtatute of *Eliz.*

(*a*) *R. acc.* 1 *Str.* 83. *Foley* 137. *Cald.* 133.

25. *Inter* the Inhabitants of the Pariſh of Honiton *and* St. Mary-Axe.

Vide ante 530. con.

[Mich. 9 Ann. B. R.]

H. Came to *Honiton* with a certificate from the pariſh of *A.*; after this he went to the pariſh of *B.*; and now being ſent to the pariſh of *A.*, the ſaid pariſh offered to prove that he was ſettled at the pariſh of St *Mary-Axe*; and the queſtion was, Whether *A.* was bound by the certificate as to *Honiton* only, or concluded as to all pariſhes whatſoever? *Et per Cur.* Before the ſtatute a certificate was only an evidence of a private undertaking between the pariſhes, in the nature of a contract; but now it is a ſolemn acknowledgment, like the conuzance of a fine; and thereby the party is owned to be legally ſettled there, and that they will provide for him; and as all other pariſhes on this certificate are bound to receive him, ſo the pariſh that certifies is concluded as to all other pariſhes. And there is no reaſon why it ſhould differ from an adjudication, ſince this is the acknowledgment of the pariſh ſigned by the proper officers, and made before two juſtices of peace, who are proper judges, and upon leſs evidence could have adjudged it a ſettlement, by which ſentence all parties would be bound, and there is no remedy but to repeal it.

Certificate concludes the pariſh giving it, as to all the world. Black. 192. S.C. Caſes L. E. 9. Vide the Caſe of St. Giles's in Northampton, ante pl. 16. contra.

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R. contra 4 T. R. 251.

26. *Inter* The Pariſhes of Evelin in Oxfordſhire *and* Rentcomb in Glouceſterſhire.

[Hill. 10 Ann. B. R.]

Renting a mill of 10 l. per annum gains a ſettlement. Vide ante 462, 524. 1 Show. 12. Fareſt. 54. 5 Mod. 419.

AN order was drawn up ſpecially to have the opinion of the Court, Whether renting of a water-mill of 10 *l. per annum* would make a ſettlement? *Et per totam Curiam* clearly, A mill is a tenement, and the renting thereof muſt gain a ſettlement within the ſtatute (*a*).

(*a*) *R. ſimiliter* as to a windmill, *Bur. S. C.* 107. 2 *Str.* 1077.

27. *Inter* The Pariſhes of Gatton *and* Milwich.

[Hill. 10 Ann. B. R. S. C. Foley 123.]

Pariſh clerk nominated by the parſon is in for life, and gains a ſettlement. Vide ante 478, 523. 1 Show. 12. Shaw. P. L. 223. S. C. Set. and Rem. 158.

AN order was drawn up ſpecially for the opinion of the Court; and the queſtion was, Whether one appointed clerk of the pariſh by the parſon, and executing the office for a year, ſhould gain a legal ſettlement within 3 & 4 *W. & M.*, of which the words are, *viz. ſhall execute any annual office or charge?* For it was objected, that this was not an annual office. Mr. *Lechmere contra:* The intent of the act was, that no office under an annual one ſhould gain a ſettlement, and *majus continet in ſe minus.* On the general nomination to the office of pariſh-clerk he is in for life. *Powell*, J. His being put in by the parſon makes no difference, no more than where the conſtable is put in by the leet, and not by the pariſh; it is more than an annual office, he is not removeable, and has fees. *Eyre*, J. He is but a ſervant to the perſon at will: Where he comes in by election, he has an eſtate for life by the cuſtom, but here is no deed or writing: How can he have an eſtate for life in this office? *Powell*, J. At that rate he has not an office at will, for a man cannot have an office at will without deed. The office of churchwarden was by common law, and yet that is for a year without any deed or writing. So it is of a pariſh-clerk, he is by common law an officer, and is in for life without deed; ſo ruled, *abſente Parker*, C. J.

Str. 542.

Powers.

Lutw. 1464. 4 Mod. 265. 1 Mod. 318. 6 Co. 33. 8 Co. 70. 4 Co. 70. S. C. 5 Mod. 244, 245, 378, &c. Vide 6 Mod. 20. Cases B. R. 147. Holt 414.

1. Winter *verſus* Lovedore.

[Mich. 9 Will. 3. B. R. 1 Ld. Raym. 267. S. C. Comyns 37. S. C.]

IN *ejectment* a ſpecial verdict was found, That *G. P.* was ſeiſed of the manor of *M.*, and on the marriage of his ſon, ſettled the ſaid manor to the uſe of himſelf for life, remainder to his wife for life, remainder to his ſon in tail, with a *proviſo*, that he ſhould have power during his life, and ſo the wife after him, to demiſe the premiſes in poſſeſſion, for one, two, or three lives, or in reverſion for one, two, or three lives, or thirty years, or for any number of years determinable on one, two, or three lives, ſo as ſuch demiſe be not of the demeſne lands. *G. P.* reciting that *J. S.* and his wife held a copyhold tenement for life, demiſed the ſaid copyhold tenement to the leſſee for thirty years, to begin after the death, ſurrender, or forfeiture of *J. S.* and his wife; and the queſtion being, Whether this leaſe of a copyhold was purſuant to, and warranted by the power? it was held in this caſe by *Holt*, C. J.

Power to demiſe any lands, except the demeſne lands of the manor. Copyholds are within the exception. Vide Ray. 132. Pop. 9. Yelv. 222. Moor 494. 2 Lev. 60, 149, 150. 1 Lev. 150, 241. Carth. 427. S. C. 1 Inſt. 54. Comb. 371.

1ſt, That any leaſe, to commence *in futuro*, is in ſome ſenſe a leaſe in reverſion, as it is oppoſed to a leaſe in poſſeſſion; but a leaſe within ſuch a power muſt be conſtrued of a leaſe to commence in poſſeſſion after another leaſe or intereſt already created before the reſervation of the power, and not after; and that a leaſe to commence after any other leaſe, is properly a leaſe in reverſion; but that a leaſe for life, to commence after another leaſe in being, is a concurrent leaſe; becauſe a freehold cannot expect, but muſt commence in poſſeſſion preſently; however, this may be ſaid to be a leaſe in reverſion within ſuch powers.

1 Lev. 168. 8 Mod. 251. 5 Mod. 381. If a man hath a power to make leaſes in poſſeſſion or reverſion, he cannot do both.

2dly, That *G. P.* might make a leaſe in reverſion abſolutely for thirty years, by virtue of this power, becauſe the limitations and reſtrictions are disjoined, and the latter part is carried on by way of enlargement of the power; to which *Turton* and *Eyre* agreed, *Rokeby diſſentiente.*

3dly, That this leaſe was void, becauſe it was of copyhold lands; for by a grant of the demeſnes the copyholds will paſs; and by the ſame reaſon, by excepting the demeſnes the copyholds are excepted; and the rather, be-

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cauſe the power is derived out of the inheritance, and the tenant at will by his leaſes might deſtroy the copyhold, which is unreaſonable; and if there were nothing elſe for the power to work upon in this caſe, he may by virtue thereof demiſe the rents and ſervices.

2. Lord Kilmurry *contra* Geery.

[Paſch. 12 Ann. In Canc.]

Power to charge lands with a ſum of money, imports intereſt thereof alſo. Vide Chan. Rep. 18, 23, 281, 363, &c. Eq. Ab. 341. P. 4. S. C. Vi. 1 Lev. 151. Hard. 398.

IT was held, That if a man has power to charge land with any ſum not exceeding the ſum of 3000 *l.* he may charge it with 3000 *l.* and the intereſt beſides; for the intention is to charge the premiſes with 3000 *l.* principal money, and that of courſe carries intereſt, and none would lend ſuch ſum on ſuch ſecurity, if the law were otherwiſe (*a*).

(*a*) *Vide acc.* 2 *Wms.* 591. 2 *Atk.* 358.

Preſcription.

Star *verſus* Rookeſby. Mich. 9 Ann. B. R.
Vide *title* Fences, vol. 1. *page* 335.

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Preſentation, Admiſſion, Inſtitution, Induction.

Vide Hob. 302. 3 Leon. 47. 6 Co. 57. 1 Leon. 230. 2 And. 49. Cro. El. 518. 3 Lev. 313. S. C. 4 Mod. 134. 2 Lutw. 1034. Parliament Caſes 88. Nel. Lutw. 348. Carth 311. Holt 609.

1. Hele *verſus* the Biſhop of Exeter.

[Mich. 3 W. & M. B. R.]

Where the ordinary refuſes quia inſufficiens in literaturâ, he muſt ſhew in what particular. Vide 5 Co. 57,

IN *quare impedit* the biſhop pleaded, That the church became vacant on the 15th day of *April*, and that the plaintiff preſented to him on the 19th day of *May* following one *Hodder*; that he examined *Hodder*, and found him *perſonam minus ſufficien. in literaturâ, ac eâ ratione fore perſonam*

perſonam inhabilem & minimè idoneam ad habend. beneficium cum curâ animarum, and therefore refuſed him on the 20th day of *June*, and gave the plaintiff notice; and becauſe no other was preſented within ſix months after the avoidance, he collated the other defendant (the incumbent) who was inſtituted. The incumbent pleaded to the ſame effect. The plaintiff replied, that *Hodder*, at the time of his preſentation, was vicar of another church; that he was *homo literatus*, and in prieſt's orders; that he was licenſed to preach, and had celebrated divine ſervice many years, and was *ſufficienter literatus* to celebrate the ſame. There was a rejoinder and ſurrejoinder, (which were laid out of the caſe,) and thereupon a demurrer. *Et per Cur.*, 1ſt, The ordinary muſt examine in convenient time, and after that refuſe in convenient time; if he does not, he is a diſturber by his delay. 2dly, If the ordinary refuſe, *quia criminoſus*, he need not give notice of his refuſal, for the crime is as much in the conuſance of the patron as of the biſhop, and in that caſe the lapſe ſhall incur from the avoidance; but if he refuſe, *quia illiteratus*, he muſt give perſonal notice, and the lapſe ſhall incur from the refuſal. 3 *Cro.* 119. 1 *Lev.* 31. *Dy.* 327. 2 *Ro.* 364. 3dly, That the ordinary might well refuſe him now, as unfit for this cure, though he had been allowed for a former. 4thly, It was not determined what learning was neceſſary. While the liturgy was in *Latin*, that language was undoubtedly neceſſary; now indeed the liturgy is in *Engliſh*. But it was obſerved that 13 *Eliz.* c. 12. requires a clerk ſhould be able to anſwer his ordinary, and give an account of his faith in *Latin*, according to the Articles. 5thly, The Court held this pleading too general, becauſe it was not ſhewn what learning he was defective in; whereas it ought to be certain, becauſe it is traverſable; and if the clerk die, to be tried by a jury, and the king's courts to judge of it; and the law will the rather require a certainty, becauſe this anſwer is to diſable a man in his profeſſion, and prevent him of a freehold. Judgment was given for the plaintiff, which was reverſed upon a writ of error in parliament. [*Parliament Caſes* 88 to 104. This judgment reverſed in the Houſe of Lords.]

58. 1 And. 189, 190. 3 Leon. 198, 199, &c. Cro. El. 242. Hob. 296. Carth. 311. 2 Lutw. 1004 &c. 2 Inſt. 622.

Ordinary may examine and refuſe; but it muſt be in convenient time.

Muſt give notice of his refuſal, if it be quia illiteratus; ſecus if criminoſus. Vide Com. 359. 2 Inſt. 632. 1 Burn. E. L. 142. Cro. El. 119.

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2 Inſt. 632.

3 Lev. 314.

2. Dominus Rex & Domina Regina *verſus* The Biſhop of London *and* Dr. Birch.

[Mich. 7 Will. 3. B. R. 1 Ld. Raym. 23. S. C.]

S. C. 3 Lev. 382, &c. 4 Mod. 190. 1 Show. 501, 441, 495, 413. Comb. 301. Holt 585.

IN a *quare impedit* againſt the biſhop of *London* and *Dr. Birch*, for hindering to preſent to the pariſh-church of St. *James's*, the declaration ſet forth, That St. *Martin's in the Fields* being a great pariſh, an act of parliament

Where a new advowſon is created by ſtatute, it is ſubject to the ſame rules of

law and prerogatives of the crown as an old one. Ca. Parl. 170.

was made 1 *Jac.* 2. to take the pariſh of St. *James* out of it, and make it a pariſh of itſelf with cure of ſouls, and Dr. *Tenniſon*, who was then vicar of St. *Martin's*, the firſt rector; and appointing the patronage, after the death of Dr. *Tenniſon*, to the biſhop of *London* and his ſucceſſors, and the Lord *Jermyn* and his heirs alternately: *Virtute cujus* Dr. *Tenniſon* was firſt rector, and being ſo, was afterwards made biſhop of *Lincoln*; whereupon it belonged to the king and queen to preſent by prerogative. To this the biſhop demurred. and Dr. *Birch* pleaded the ſtatute of 25 *H.* 8. and that by virtue of the ſaid act, the archbiſhop of *Canterbury* gave Dr. *Tenniſon* a diſpenſation to hold this church *in commendam*; which the king confirmed, from the 22d day of *October* till the 1ſt of *July* following, *&c.* To this the attorney-general demurred. 1ſt, It was objected for the defendant that this prerogative was unreaſonable; but the Court anſwered, that ſince the king made the church void, it was no hard matter that he ſhould be allowed to fill it; and the patron was not much hurt, for it was only one life exchanged for another; and Sir *Giles Eyre* held, that if a parſon be promoted to be a biſhop, the church was void by the common law; but the reaſon of it was not from the incompatibility, becauſe originally the biſhop was incumbent of the whole dioceſe, and ſerved the cure by others: and the Court did admit that the Crown did not anciently exerciſe this prerogative, but the pope did by uſurpation; and that notwithſtanding the ſtatute of proviſors, 25 *E.* 3. the pope would collate if the incumbent was made a biſhop 4 *E.* 3, 5. *Owen* 144. Then 7 *H.* 7. *c.* 8. was made againſt proviſions; but notwithſtanding that the pope went on. *Vide Cotton* 458. *Mo.* 399. 3 *Cro.* 5, 6. *Owen* 144. *Win.* 94. 2 *Cro.* 691. *Dy.* 228., which was but a ſudden opinion.

Vide Vaug. 18. Str. 837. Bl. Rep. 770. 3 Wilſ. 221.

2 Wilſ. 182. Before the Reformation the pope preſented upon promotion of the incumbent.

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2dly, They held, That the king's turn was not ſerved by the confirming the *commendam*; for the diſpenſation was only to ſave the avoidance, and the confirmation continued the poſſeſſion, but transferred no right.

Vide Str. 1056. Hob. 143. Dyer 233. a. b. in marg.

3dly, This being a new patronage created by act of parliament, not in *eſſe* before, which appoints a particular perſon to have the firſt turn after the next avoidance; it was objected, that nobody could ſay the king ſhould preſent, when the act ſaid otherwiſe; and this was therefore a caſe exempt from the prerogative: But the Court held that the act did not interfere with the prerogative. If a eſtate-tail is created by act of parliament, it is ſubject to ſuch bars as other lands intailed are. The wife ſhall be endowed of a new eſtate. *Vide* 8 *Co.* the *Prince's* Caſe *a pari ratione* a new rectory ſhall be ſubject to the king prerogative.

Hob. 280. 5 Co. 24. 11 Rep. 67.

4thly, It was objected, That this new church, as to Dr. *Tenniſon*, was a kind of donative, he coming in without inſtitution and induction, and that the preſentable parſonage does not commence till after him, by the words of the ſtatute; and that in caſe of a donative, the promotion of the incumbent does not make a ceſſion.

Sed Curia contra: For in point of eſtate, the right of preſentation commences by the paſſing of the act immediately; but in point of intereſt, not till the avoidance. *Vide* 3 *Cro.* 323. 10 *Co.* 107. 4 *Mod.* 190. *Show.* 164. 3 *Lev.* 352. *S. C.*

3. Ladd *verſus* Widdows.

[Mich. 1 Ann. B. R.]

UPON a motion by ſerjeant *Selby* for a new trial in a *quare impedit*, wherein the point in iſſue was, Whether the church was donative or preſentative? evidence was pretended of ſeveral preſentations; and the Court, *viz. Holt*, C. J. and *Powell*, J. held, That though a preſentation might deſtroy an impropriation, yet it could not deſtroy a donative, becauſe the creation thereof was by letters patent, whereby land is ſettled to the parſon and his ſucceſſors, and he to come in by donation.

Preſentation may deſtroy impropriation, but not a donative. Holt 259. S. C. Degg. 205. contra. Vide 2 Cro. 63. Co. Lit. 344. n. 2 Rol. 342. l. 50.

Principal and Acceſſary.

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Vide 1 Lev. 204. Hale's P. C. 215 to 225. Hawk. P. C. 310, 311, &c.

1. Domina Regina *verſus* Naſh.

[Mich. 1 Ann. B. R. 2 Ld. Raym. 989. S. C. not S. P.]

UPON a conviction of deer-ſtealing by juſtices of peace, on the late ſtatute, the queſtion was, Whether one not preſent, but procuring, adviſing, and abetting, by lending his gun, dog, &c. before the fact, ſhould be ſaid *to be aiding and abetting therein? Holt*, C. J. inclined, 1ſt, That he was not within the words, not being actually preſent at the fact, becauſe the ſtatute is to be conſtrued ſtrictly, for that it takes away the privilege of a better trial, *viz. per pares*. 2dly, Becauſe it adds a farther penalty to what was an offence before. He ſaid there

Who is an aider and aſſiſter in deer-ſtealing within 3 & 4 W. & M. c. 10. N. B. Farcſl. 129 to 137. Vide Cro. Car. 340.

might be an aiding and abetting before the fact, *viz.* by advice, *&c.*, or in the fact, by being preſent; or after the fact, by abetting the party. *Vide Dy.* 187. *Co. Ent.* 56. The other judges held aiders in the fact would be principals, and then aiders and abettors would mean nothing. *Quod Holt negavit*, ſaying, All that are preſent may be ſaid to be principals as to an action of treſpaſs, but not as to the penalty of this ſtatute: And this diverſity is apparent in other caſes, for one aiding and aſſiſting upon the ſtatute of ſtabbing ſhall have his clergy, whereas a principal ſhall not; ſo in the caſe where two went to break a houſe, one broke it and entered, the other ſtood upon the ladder and received the goods; he that ſtood upon the ladder ſhall have his clergy, aud the other ſhall not, being a principal (*a*).

Vide Kely. 52, 53. 1 And. 1 6.

(*a*) *Quære*, if the laſt point is not placed here by miſtake; for at the end of the report of the next caſe, *Q.* and *Whiſtler*, in Ld. *Raymond*, there is a reference made by *Holt*, Ch. J., to a caſe in *Cro. Car.* 473. having the circumſtances above ſuppoſed in an indictment on the ſtat. 39 *El. c.* 15., againſt ſhoplifting.

2. Domina Regina *verſus* Whiſtler.

[Hill. 1 Ann. B. R. 2 Ld. Raym. 842. S. C.]

Where ſtatute makes an offence felony, acceſſaries (properly) are within it, though not named; otherwiſe where it makes a particular fact more penal. Far. 120. S.C. Rep A Q. 25. Holt 215.

ROLFE and others were convicted of deer-ſtealing upon 3 & 4 *W. & M. c.* 10., and that *Whiſtler* was *illicite & injuſte auxilians & aſſiſtens præfat. Rolfe, &c. in illicita & injuſta venatione & occiſione damæ præd., viz. perſuadendo & incitando præfat. Rolfe* to kill the ſame deer, and lending dogs to hunt and kill, and horſes to carry away the ſaid deer, *contra formam ſtatuti*; and whether this was an aiding and aſſiſting within the ſtatute, was the queſtion. *Powel*, *Powys*, and *Gould*, Juſtices, held that it was; but *Holt*, C. J. *contra*, held, that the conviction ought to be quaſhed; for that where a ſtatute makes that felony, which was not ſo at common law, aiders and abettors, according to the notion of the common law, are within the ſtatute, though not expreſſed; but where an offence at common law is only made more penal, aiders and abettors are not to be underſtood of ſuch as aid before and after the fact, but ſuch as are preſent only: Theſe were only acceſſaries at common law, and are not within the act. *Vide* 1 *Cro.* 474. *Dal.* 11, 22. *Poſtea*, in the ſame caſe, *Holt*, C. J. ſaid, he held the ſame diverſity, with this farther, that this is to be underſtood when an offence at common law is made more penal by a particular deſcription of the fact, and not under a general denomination of the crime; as if this ſtatute had enacted theſe penalties on them as treſpaſſers,

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3 Cro. 750. 12 Co. 86.

Vide 1 Salk. 181, 182.

paſſers, as it is done by the ſtatute *de malefactoribus in parcis*. *Vide* 1 *And.* 116. *Hale* 51, 216.

Privilege of Perſons.

Vide 3 Lev. 243, 393. Lutw. 196, 197, 641, and 1466. 1 Sid. 319. 2 Sid. 164. 1 Vent. 137. Cro. El. 138.

1. Kirkham *verſus* Wheely.

[Trin. 7 Will. 3. B. R. 1 Ld. Raym. 27. S. C.]

TO an action *qui tam*, the defendant pleaded that he was an attorney of the court of Common Pleas, and that attornies *de C. B.* were not ſuable elſewhere. To this the plaintiff demurred, 1ſt, Becauſe the plea is only in the negative, and no juriſdiction is given to any other court. 2dly, Becauſe there is no defence by *venit*, but *dicit* only. *Per Cur.* As to the plea being in the negative, it is well enough; for the privilege is not traverſable and triable *per pais*, but a matter of law of which we take notice; and *venit & dicit*, or *dicit* only, is a ſufficient defence in this caſe. 14 *H.* 6. 14, 19.

Pleas to the juriſdiction in the negative is well enough. Ante 30. S. C. Comb. 319. 3 Salk. 282. Caſ. B. R. 74. Defence by venit & dicit, or dicit only, is well in plea to the juriſdiction. Vide prox. caſum.

2. Stephens *verſus* Arthur.

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Vide prox. caſum ante.

[Eodem Termino.]

THE defendant pleaded to the juriſdiction thus, *viz.* *Et idem Arthurus in propria perſona ſua dicit*, that he is a clerk to a prothonotary of the Common Pleas; and it was objected, that he did not ſay *venit & dicit*. *Et per Cur.* *Venit* is no part of the plea, but *dicit* begins the plea; *dicit* alone ſhews him to be in court, and here it appears he is *in cuſtodia*.

Defence. 3 Lev. 182. 1 Lutw. 7, &c. 2 Lutw. 1590. Andrews 46.

3. Lane *verſus* Saltmarſh.

[Hill. 8 Will. 3. B. R.]

AN attorney *de C. B.* being ſued by bill in *B. R.*, *Buxton* moved he might be diſcharged. Denied *per Cur.*; for let him plead his privilege. Ld. Raym. 1567.

1 Wilſon 306. S. P. Andrews 45. Str. 864. 2 Bl. Rep. 1085.

4. Brown's *Caſe.*

[Hill. 9 Will. 3. B. R.]

Phil'zers, &c. 3 Lev. 343. 2 Lev. 129. 1 Lutw. 44, 631, 1466. 1 Will. 306.

A Philizer *de B. R.* was arreſted *per breve*, but diſcharged on common bail; for he ought to be ſued by bill, as *præſens in Curia. Per Cur., abſente Holt*, C. J. (*a*)

(*a*) The officers of the Common Pleas have not the privilege of being ſued there *by bill*, as attornies have; but have the privilege of being ſued *there* by original writ, *Baker* v. *Swindon*, Ld. *Raym.* 399. 3 *Salk.* 283. 1 *Barnes* 280. 2 *Cromp. Pr.* 135.

5. Branthwait *verſus* Blackerby & al.

[Hill. 9 Will. 3. B. R.]

For a joint cauſe of action againſt an attorney with another man, both muſt be arreſted. Vide 1 Saund 68, 69. Caſes B. R. 163. S. C. 1 Vent. 298.

IF a man hath a joint cauſe of action againſt two, one an attorney, and the other not, he muſt arreſt both, and declare againſt them as in cuſtody. A bill cannot be filed againſt a perſon privileged in vacation (*b*), for then he is not preſent in court; and as to the vacation, it begins the laſt day of the term, as ſoon as the court riſes. (*Vide* 2 *Lev.* 129. 1 *Vent.* 298.)

Note; The bill muſt be filed, though the attorney agrees to appear and diſpenſe with it; but it may in ſuch caſe be filed afterwards. *Paſch.* 9 *Will.* 3. *B. R. Robert's* caſe.

(*b*) In *Waghorne* v. *Fields*, 5 *T. R.* 174. it was decided that a bill may in all caſes be filed againſt an attorney in the vacation. *Vide Comerford* v. *Price*, *Doug.* 312. *Lane* v. *Wheate*, *ibid.* 313. *n.* 84.

6. Anonymous.

[Hill. 2 Ann. B. R.]

Privilege eundo & redeundo. Vide Raym. 100. 3 Lev. 343. Andrews 275.

H. Came to confeſs an indictment, and the Court held, that he had no privilege, *eundo & redeundo*, becauſe there was no proceſs againſt him (*c*).

(*c*) In *Meekins* v. *Smith*, *H. Bl.* 636. the Court of Common Pleas laid down this general rule, *viz.* that all perſons who have relation to a ſuit which calls for their attendance, whether they are compelled to attend by proceſs or not, (in which number bail are included,) are entitled to privilege from arreſt *eundo et redeundo*, provided they come *bona fide*.

7. Dillon *verſus* Harper.

S. C. 1 Salk. 328. Fareſl. 106.

[Trin. 2 Ann. B. R. 2 Ld. Raym. 898. S. C.]

Where privilege of an attorney is pleaded with a writ, his being an attorney cannot be denied; otherwiſe if without.

AN attorney *de C. B.* being ſued in *B. R.*, pleaded his privilege; to which it was demurred ſpecially, for not concluding his plea with a *profert* of a writ of privilege, teſtifying his being an attorney, *&c.* *Et per Holt*, C. J. The difference is, if privilege of an attorney be pleaded with a writ, the defendant cannot be denied to be an attorney; if without, he may, and then a *certiorari* ſhall be awarded to certify whether he be an attorney, or not.

Skin. 502.

8. Scawen *verſus* Garret.

[Trin. 4 Anu. B. R. 2 Ld. Raym. 1172. S. C.]

Plea of privilege of an attorney of C. B. need not ſhew the writ under ſeal, nor a venue, nor where the C. B. ſits. Vide 1 Saund. 67. Fareſl. 97. 6 Mod. 114. 5 Mod. 310. 1 Salk. 6. Holt 587. S. C. Lilly Ent. 3.

TO an action in *B. R.* the defendant pleaded, that he was an attorney at the Common Pleas. On demurrer Mr. *Ward* objected, that he ought to produce his writ, and conclude with a *prout patet per recordum*; and alſo that he laid no *venue*, alleging no place where he was attorney, nor where the court of Common Pleas ſits. *Et per Cur.*, *viz.* *Holt*, C. J., to which the reſt aſſented, An attorney may plead privilege with a *profert* of his writ, if he will; or with an exemplification of the record of his admiſſion; or he may plead it as he does here, and it is well enough, for ſo are the precedents, and the plaintiff may reply *nul tiel record*. *Vide* 1 *Brown.* 2 *Thom.* 4. *Cliff.* 570. *Brevia judicialia* 169, 172., cited *per Broderick*. Thirdly, There was no need of a *venue* to try where he was attorney, for it being a matter concerning his perſon, was triable where the writ is brought: So in treſpaſs, if the defendant pleads *ſon villain regardant*, and the plaintiff replies *frank-home*, it muſt be tried where the writ is brought. As to the 3d, he wondered how that ever came to be allowed; for that this Court ſends writs to the Chief Juſtice of the Common Pleas by that name: And unleſs where this is held to be part of the deſcription of a record, it can never be neceſſary (*a*).

Privilege of Jurors, Raym. 113, 144. 1 Lev. 159.
Privilege of the King's Servants, *&c.* Raym. 152, 180. 1 Lev. 233, 265.

(*a*) An attorney has privilege of ſuing a member of the univerſity in the Court to which the attorney belongs, *Joliffe* v. *Langſton*. 1 Ld. *Raym.* 342. Where an attorney of one Court ſues an attorney of another by attachment,

ment, the Court firſt poſſeſſed of the cauſe ſhall be preferred, *Danſer* v. *Berryman*, 2 *Bl.* 1325.; but ſuing by original is a waiver of privilege; *Hetherington* v. *Lowth*, 2 *Str.* 837. Where both plaintiff and defendant are attornies of the ſame Court, the ſuit muſt be by bill, and not attachment, *Ratcliffe* v. *Beſley*, 2 *Str.* 1141. If both parties are attornies of *B. R.* privilege will be allowed, *ſecus* if the plaintiff belongs to *C. B.* and defendant to *B. R.*, *Shorter* v. *Packhurſt*, 1 *Bl.* 19. An attorney has no privilege againſt the Court of Conſcience in *London*, *Silk* v. *Rennett*, 3 *Bur.* 1583. *ſecus* as to the County Court of *Middleſex*, *Wiltſhire* v. *Lloyd*, *Doug.* 380. An attorney of *B. R.* being ſued as an attorney of *C. B*, and lying by was held to waive his privilege, *Hern* v. *Howard*, 1 *Bl.* 231. A *ca. ſa.* for coſts, returnable on a general return, held good againſt an attorney who had ſued by attachment of privilege, and was nonſuited. *Perrott* v. *Hele*, 3 *Wilſ.* 58. Plea of privilege as an attorney ought to conclude to the record, *Foſter* v. *Cole*, 1 *Str.* 114.

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[546] # Privilege of Place.

Privilege of the Exchequer. 6 Mod. 305. Ante 511. Poſt 550. pl. 12. 1 Lutw. 46. 2 Wilſon 228. Andrews 45.

PER *Walter*, Chief Baron. The cauſes of privilege in the Exchequer are, 1ſt, If one be informer for the king. 2dly, If one be accountant to the king. 3dly, If one be debtor to the king. 4thly, Where one is an officer of the court, or attends an officer of the court. Always where the plaintiff is privileged, the ſuit is by *quo minus*; where the defendant is privileged, the ſuit is by bill. 31 *H.* 6. 10. 22 *H.* 6. 19. *b.*

Superſedeas to a ſuit in the Exchequer, dummodo non tangit nos.

A writ was delivered to the barons of the Exchequer in open court, commanding them to ſtay a ſuit between *Wilſon* and *Rookes*, by *dummodo non tangit nos vel*, &c., and the writ was diſallowed, for that the defendant might have pleaded that matter to the juriſdiction of the Court. It was admitted, that there is ſuch a writ in the Regiſter, but there are ſeveral writs there which no uſage or precedent does warrant, of which this is one. *Et per Walter*, Chief Baron, Where one entitled to the privilege of this court is ſued in *C. B.*, this Court ſends a *ſuperſedeas*; but if it be in *B. R.* they do not ſend a *ſuperſedeas*, for that would be to ſuperſede the king; but the practice is, to ſend up the writ-book by the *puiſne* baron, and demand privilege. *Trin.* 3 *Car. In Scac.*

Privilege of the King's Palace, &c. *Vide* 6 Mod. 73 *to* 76. 1 Mod. 76. 1 Sid. 211. 1 Lev. 106. 1 Vent. 169. 2 Mod. 181. 3 Inſt. 141. Pryn's 4 Inſt. 18, 19. Philipp's Regale Neceſſarium, *chap.* 1 & 3. 1 Hawk. *cap.* 21.

Prohibition and Conſultation.

Hob. 300, 301. 3 Bulſt 51. S. C. 1 Show. 158, 172. Vide Raym. 123, 189, 191, 219. Cro. El. 88, 666. Carth. 142. 3 Mod. 283. Comb. 160. Holt 612.

1. Shotter *verſus* Friend.

[Hill. 1 W. & M. B. R. Rot. 39]

Prohibition to a ſuit for a legacy, for refuſing proof of payment by one witneſs. Latch. 117. Moor Caſ. 568. Otherwiſe in probate of wills. 1 Lev. 164, 180. 2 Lev. 64.

AN executor being ſued for a legacy in the Spiritual Court, pleaded payment, and offered to prove it by one witneſs, which the judge refuſed, and gave ſentence againſt him. Upon this matter ſuggeſted, a prohibition was moved for. *Et per Cur.* 1ſt, Where the Eccleſiaſtical Court proceed in a matter merely ſpiritual, if they proceed in their own manner, though that is different from the common law, no prohibition lies; as in probate of wills; there, if they refuſe one witneſs, no prohibition lies. *Noy* 12. 2 *Ro.* 300. 2dly, Where they have conuſance of the original matter, and an incident happens which is of temporal conuſance, or triable by the common law, they ſhall try the incident, but muſt try it as the common law would: Thus in a ſuit for tithes or for a legacy, if the defendant pleads a releaſe or payment, or in a ſuit to prove a will, if the defendant pleads a revocation. 1 *Ro. Rep.* 12. 2 *Ro. Rep.* 42. *Yelv.* 92. So in the caſe at bar, they ſhall try the matter of payment or no payment, but then they muſt admit ſuch proof as the common law would, or otherwiſe they reject the cauſe themſelves, and ought to be prohibited. 3dly, A bare ſuggeſtion, that the defendant has but one witneſs, and that they take exceptions to his credit and reputation, is no cauſe of prohibition; for if they admit the proof of one witneſs, whether he be a credible witneſs, or not, they ſhall judge, and the party has no remedy but by appeal. 4thly, That it is not too late to come for a prohibition after ſentence; for the ſentence in this caſe is the grievance. Conſultation denied.

Temporal incident muſt be tried according to rule of the common law. Vide poſt pl. 11. 3 Mode 233. S. C. 6 Mod. 239. Vide Cowp. 424. 2 Rol. 305. 655. 1 Vent. 291.

Vide Doug. 376. (363.) 2 T. R. 473.

2. *Inter* Starky *and* The Churchwardens of Watlington in Suſſex.

[Trin. 4 W. & M. B. R.]

Prohibition to ſtay a ſuit in the Spiritual Court for taking bells. See 6 Mod. 12, 12, 25, and 79, 492. Rol. 57.

SUIT in the Spiritual Court for taking away two bells out of the ſteeple, and a prohibition was granted; for the churchwarden is a corporation, and the property is in him, and he may bring trover at common law.

424, 131. 1 Salk. 34, 35. 4 T. R. 351. 2 Inſt.

3. Wharton *verſus* Pits.

[Trin. 4 & 5 W. & M.]

Prohibition to the Admiralty denied, unleſs the defendant would appear and give bail. 1 Vent. 146, 343. Ray. 3. 3 Mod. 244. Poſt 553.

A Suit was in the Admiralty againſt the maſter and ſhip which lay in the *Thames*, for heedleſsly running over another ſhip, and the defendant there moved for a prohibition. The plaintiff informed the Court, that the defendant would not appear, ſo that he could have no remedy at law; upon which the Court refuſed a prohibition, unleſs the defendant would appear and give bail (*a*).

(*a*) *R. cont.* 3 *T. R.* 316. Lord *Kenyon* there ſaid, that as the reaſons of the judgment in this caſe, as here reported, were not diſcloſed, and as the caſe itſelf was not mentioned in any other book, the Court were of opinion that it was not a ſufficient authority to warrant them in impoſing the terms prayed for. *N. B.* Thoſe terms were the ſame as the above.

4. Harris *verſus* Hicks.

[Hill. 4 & 5 W. & M. B. R.]

Prohibition quoad annulling marriage and baſtardiſing iſſue. 1 Sa.k. 120 to 123. 3 Lev. 410. Lutw. 1059, 1065. 4 Mod. 182. Carth. 271. called Hinks verſ. Harris. S. C. 4 Mod. 182. Comb. 200. Caſes B. R. 35. Stiles 10.

PROHIBITION was moved for to the Eccleſiaſtical Court of *Coventry*, where a ſuit was againſt the plaintiff for inceſt, in marrying his firſt wife's ſiſter, ſuggeſting that the ſaid ſecond wife was dead, and by his ſaid wife he had a ſon, to whom an eſtate was deſcended as heir to his mother, and that notwithſtanding that he had pleaded this matter, they went on to annul the marriage and baſtardize the iſſue. *Et per Cur.* A prohibition ſhall go as to annulling the marriage or baſtardizing the iſſue, but they may proceed to puniſh the inceſt.

2 Jon. 213. 2 Vez. 245.

Lutw. 1037, 1043, 1053.

5. Hawkin's *Caſe*.

[Hill. 8 Will. 3. B. R.]

Prohibition to a ſuit for calling H. knave. Vide Far. 31. Poſt. 692, 693. 2 Lev. 49, 63, 66. 3 Lev. 17, 119, 137, 350. Godb. 447. 2 Rol. 317.

H. Libelled in the Spiritual Court for calling him a *knave, a knave, and a knave indeed*; and a prohibition was granted, becauſe nothing was ſaid that could make him liable to eccleſiaſtical cenſure. The ſtatute *de circumſpecte agatis* mentions only ſuch defamations as are puniſhable in the Spiritual Court; and for ſuch as the Spiritual Court cannot puniſh, the party ſhall not be liable there: The reaſon why the laying violent hands upon a clergyman was there ſuable, was, becauſe the clerk having *habitum*

habitum & tonſuram, which made him known, it was an affront to the whole order.

6. Gardner *verſus* Booth.

[Trin. 10 Will. 3. B. R.]

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WHERE it doth appear in the libel, or by the proceedings in the cauſe, that the conuſance of the cauſe does not belong to the Spiritual Court, a prohibition may be moved for and granted after ſentence; and this holds in all caſes but where one is ſued out of his dioceſe; for there, if he doth not take advantage of it before ſentence, he ſhall not have * a prohibition after ſentence; *ratio eſt*, becauſe the cauſe doth belong to the Spiritual Court; and though it doth not belong to that Spiritual Court, it belongs to ſome other, and not to the king's Temporal Court.

Prohibition may be granted after ſentence where cauſe is not of ſpiritual conuſance; otherwiſe for citing out of the dioceſe. Vide Fareſl. 137, 148. S. C. Caſes B. R. 196. Andrews 11. 2 Inſt. 602. 2 Bur. 813. Cowp. 424. For prohibitions after ſentence, vide Fareſl. 137, 148. Winch. 8. 1 Show. 158, 172. 6 Mod. 252. 1 Sid. 65, 632. N. B. 2 Lev. 230. Doug. 377.

7. Biſhop of St. David's *Caſe*. Paſch. 11 Will. 3. B. R. *Vide* this Caſe, title *Biſhops, Archbiſhops*, &c. Part 1. page 134.

8. Godfrey *verſus* Llewellin.

[Trin. 11 Will. 3. B. R.]

WHERE the matter ſuggeſted for a prohibition appears upon the face of the libel, we never inſiſt upon an affidavit; but unleſs it appear upon the face of the libel, or if you move for a prohibition as to more than appears on the face of the libel to be out of their juriſdiction, you ought to have affidavit of the truth of your ſuggeſtion. *Per Holt*, C. J. *& poſtea Trin.* 12 *Will.* 3. B. R. *Vide* 2 *Co.* 45.

Where matter of the ſuggeſtion does not appear on libel, affidavit is neceſſary. Hob. 79. Andrews 7. 299. Ante 461. 1 Lev. 253. S. C. Holt. 593. Vide 4 Bur. 2040. Carth. 463.

9. Machin *verſus* Maultin.

[Mich. 11 Will. 3. B. R. 1 Ld. Raym. 452, 534. S. C.]

IN a declaration in attachment *ſur prohibition*, the caſe was, that the plaintiff lived in *Nottingham* within the province of *York*, and there ſubtracted tithes, and then removed

H. ſubtracts tithes in one dioceſe, and removes into an-

other, afterwards being found in the firſt, is there cited and ſued, and a conſultation awarded. Subtraction of tithes local. Raym. 95. Lutw. 1043, 1057, 1062, 1071. S. C. 5 Mod. 450. N. Lutw. 335. Carth. 276. 3 Salk. 90. Caſes B. R. 252. Vide Fitzg. 110.

removed into *Lincolnſhire* within the province of *Canterbury:* Afterwards he happened to go to *York*, and was ſued there in the Court of the Archbiſhop, for the ſubtraction aforeſaid, and had a prohibition on 32 *H.* 8. *c.* 9. for citing him out of his dioceſe. But at laſt, after debate, a conſultation was awarded; for that the ſubtraction of tithes is local, and muſt be ſued before the ordinary of that place where the wrong was done; otherwiſe in caſes tranſitory, *ubi forum ſequitur reum.* And as it was argued by the counſel, this is not citing out of his dioceſe within the ſtatute, becauſe the dioceſe where he lives has not a juriſdiction; and if he might not be cited in this caſe, the thing would be remedileſs and diſpuniſhable. *Vide Godb.* 191. 1 *Ro. Rep.* 328. 1 *Cro.* 97. 13 *Co.* 4. *Winch. Entr.* 570. 2 *Ro. Rep.* 448. 3 *Mod.* 211. 2 *Brown.* 12, 28.

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10. Jones *verſus* Stone.

[Trin. 12 Will. 3. B. R. 1 Ld. Raym. 578. S. C.]

Suit in the Eccleſiaſtical Court againſt the vicar of S. for not performing divine ſervice in the chapel of C., as bound by cuſtom, prohibition denied. S. C. Holt 596. Poſt. pl. 13.

DAVID Jones, the vicar of N., was libelled againſt in the Spiritual Court, for that by cuſtom time out of mind the vicars of *S.* had by themſelves, or others, ſaid and performed divine ſervice in the chapel of *Chawbury*, for which there was ſuch a recompence; and that he neglected. The defendant came for a prohibition, and without traverſing this cuſtom, ſuggeſted that all cuſtoms were triable at common law: And Mr. *Harcourt* urged, that it was enough for a prohibition, that a cuſtom appeared to charge the vicar with a duty for which he was not liable of common right. *Et per Holt*, C. J. A parſon may be bound to an eccleſiaſtical duty by cuſtom, and when he is bound by cuſtom, the Spiritual Court may puniſh him if he neglects that duty; the cuſtom might have a reaſonable commencement by compoſition in the Spiritual Court, and begin by an eccleſiaſtical act: And a bare preſcription only is not a ſufficient ground for a prohibition, unleſs it concerns a layman; whereas here it is an eccleſiaſtical right, an eccleſiaſtical perſon, and an eccleſiaſtical duty, and the preſcription not denied (*a*); notwithſtanding 2 *Inſt.* 491. I never could get a prohibition to ſtay a ſuit in the Spiritual Court againſt a parſon for a penſion by preſcription. *Vide* 1 *Vent.* 3, 120, 265.

Yareſ. 88. 6 Mod. 230. F. N. B. 51 b.

(*a*) *R. acc. Dutens* v. *Robſon*, H. *Bl.* 100.

11. Sir Baſil Firebraſs's *Caſe*.

Prohibition granted to a ſuit in equity for diſcovery of matters to make the defendant forfeit his freehold. 4 Leon. Caſ. 261. Vide ante pl. 1. Raym. 88, 221.

H. Was chief ranger of *Enfield Chaſe*, and now a bill was exhibited againſt him in the Chancery of the dutchy for a diſcovery of what deer he had killed, and what timber, wood, *&c.* he had felled and cut down, and by what warrant, and to ſhew cauſe why his patent ſhould not be repealed. And to this ſuit a prohibition was granted *niſi*; for he ſhall not be obliged to anſwer upon his oath, what is to make him forfeit his place, but it ought to be proved againſt him (*a*).

(*a*) A defendant may be protected from making a diſcovery which may ſubject him to any penalty or forfeiture, or any thing in the nature of a forfeiture, by demurrer, if the matter is apparent on the bill; or by plea, if it ariſes from extrinſic circumſtances: As when, on an inſurance of goods to a foreign port, the bill prays diſcovery whether the goods did not conſiſt of wool, which it is penal to export to ſuch port, *Dimcalf* v. *Blake*, 1 *Atk.* 52. So, whether goods were taken from the *Indians* by fraud, violence, or contrivance, *E. I. Comp.* v. *Campbell*, 1 *Vez.* 246.; or whether a bond was uſurious, Earl of *Suffolk* v. *Green*, 1 *Atk.* 450.; or whetner the defendant, at the time of her intermarriage with *A.*, was married to another perſon, 3 *Bro. P. C.* 65. So where a purchaſe of land is charged to be made from a perſon out of poſſeſſion, which is contrary to ſtat. 32 *Hen.* 8. *Sharp* v. *Carter*, 3 *Wms.* 374. Whether the defendant procured ſubornation of perjury, *Baker* v. *Pritchard*, 2 *Atk.* 387. Whether a purchaſe was made from a Papiſt, *Smith* v. *Read*, 1 *Atk.* 526. *Harriſon* v. *Southcote*, 1 *Atk.* 528. 2 *Vez.* 389. Whether the party is an alien, on an information by the attorney-general, for lands in his poſſeſſion, *Attorney-general* v. *Dupleſſis*, cited 2 *Vez.* 494. *Vide Parker* 144. Whether a perſon holds an office in truſt for the defendant, which would vacate the defendant's ſeat in parliament, *Honeywood* v. *Selwin*, 3 *Atk.* 276. Whether the defendant was married to *A.*, and *B.* was her legitimate ſon by him, when ſhe pleads that ſhe had been previouſly married to *C.*, *A.*'s brother, in which caſe her marriage with *A.* would ſubject her to eccleſiaſtical puniſhment, *Brownſword* v. *Edwards*, 2 *Vez.* 243. Whether the defendant, after being inſtituted to *A.*, has been inſtituted to two other livings, which would cauſe an avoidance of *A. Boteler* v. *Allington*, 3 *Atk.* 453. Whether the defendant had married, ſo to incur the forfeiture of an eſtate or legacy, *Monins* v. *Monins*, 2 *Ch. Rep.* 86. *Wrotteſley* v. *Bendiſh*, 3 *P. Wms.* 235. *Chauncey* v. *Tabourden*, 2 *Atk.* 392. *Chauncey* v. *Fenboulet*, 2 *Vez.* 265. Or whether a tenant has aſſigned a leaſe, wherein there is a proviſo that it ſhall be void on aſſignment, *Fane* v. *Altee*, 1 *Eq. Ca. Ab.* 77.

A defendant was compelled to anſwer a bill to diſcover a conſpiracy or attempt to ſet up a child ſhe pretended to have by a perſon who kept and was deſirous to have a child by her, *Cheboynd* v. *Linden*, 2 *Vez.* 450. To diſcover whether he was tenant for life, though he pleaded that he had made a leaſe for the life of another, which would be a forfeiture, *Weaver* v. Earl of *Meath*, 2 *Vez.* 108. To diſcover whether he has a legitimate ſon, as it does not tend to diſcover whether he cohabited with any woman, *Finch* v. *Finch*, 2 *Vez.* 491. To diſcover a ſecond marriage, upon which an eſtate was limited over from the defendant, ſuch limitation not being conſidered as a forfeiture, *Lucas* v. *Evans*, 3 *Atk.* 260.

Defendants are bound by covenants not to plead or demur to any diſcovery,

very, on account of its ſubjecting them to penalties or forfeitures, *E. I. Comp.* v. *Athyns, Com.* 346. 1 *Str.* 168. *Moſ.* 74. *South Sea Comp.* v. *Bumſted*, 1 *Eq. Ca. Ab.* 76.

If the forfeiture is waived by all who are intereſted therein, the diſcovery muſt be made, *Mitford* 158. *Vide Mitf.* 157, 224. 1 *Vern.* 109, 129, 306. *Parker* 144. 1 *Harr. Ch. Pr.* 7th edit. 378. *Bunb.* 192. *Hard.* 138. *Com. Ch.* 3. B. 2.

12. Earle *verſus* Paine.

[Mich. 12 Will. 3. B. R.]

Treſpaſs in B.R. for taking wines ſtaid by order of Exchequer, an information of ſeizure depending there. Exchequer privilege. Vide ante 546.

*[551]

PAINE, a cuſtom-houſe officer, exhibited an information of ſeizure of a hogſhead of wine belonging to Mr. *Earle*, and ſeized for not paying cuſtom. *Earle* neglected to come in and enter his claim in the Exchequer, but in the mean time brought treſpaſs in *B. R.* againſt *Paine*. Upon motion the barons ordered the proceedings in the King's Bench ſhould be ſtayed, * and the cauſe there removed into the Exchequer in the ſame ſtate and forwardneſs: *Earle* was ſerved with the order, but notwithſtanding gave rules for pleading; whereupon an attachment was iſſued by the Exchequer againſt him; whereupon he moved here for a prohibition to the Court of Exchequer. And a rule was made to hear counſel; on the *argument* ſeveral precedents were cited, one in 19 *H.* 7. *Rot.* 16. exactly like this. The Court took time to conſider of the precedents, and in the mean time the matter was compounded. *Vide Reg.* 187. 2 *Inſt.* 551.

Vide Hard. 193. Bunb. 34, 306, 309. Parker 143.

13. Anonymous.

[Hill. 12 Will. 3. B. R.]

Prohibition ſhall not go for a modus or other foreign matter, unleſs it be pleaded below. Poſt. 656, 657.

IN the biſhop of *Wincheſter*'s caſe, 2 *Co.* 45. it is held, that in a ſuit for tithes in the Spiritual Court, *H.* may have a prohibition, ſuggeſting a preſcription or *modus*, before or without pleading. But this ſeems not to be law, for 12 *W.* 3. *B. R.* a prohibition was moved for, ſuggeſting a cuſtom, &c. *Et per Holt*, C. J. and the Court, it was denied, unleſs they pleaded it below, becauſe perhaps they might admit the plea. Alſo 10 *W.* 3. *B. R.* it was ſaid by *Holt*, C. J. That if a *modus* be pleaded in the Spiritual Court and admitted, no prohibition ſhall go; but if the queſtion be, whether a *modus* or no *modus*, a prohibition ſhall go, and ſo is the law, *viz.* wherever the matter which you ſuggeſt for a prohibition is foreign to the libel, you muſt plead it below, before you can have a prohibition; otherwiſe where the cauſe of prohibition appears on the face of the libel.

Vi. 4 Bur. 2040. Rep. B. R. Temp. Hard. 357. Bunb. 17. Str. 878.

14. Jacob *verſus* Dallow.

S. C. Farreſl. 8, 6 Mod. 230. 5 Mod. 436. Caſes B. R. 233.

[Paſch. 1 Ann. B. R. 2 Ld. Raym. 755. S. C.]

THE plaintiff declared in a prohibition, ſetting forth a preſcriptive right in the plaintiff and thoſe whoſe eſtate he had, *&c.* to a ſeat in the church, and that the defendant ſurmiſing a uſage time out of mind, had libelled againſt him in the Spiritual Court, for diſturbing him in ſitting there, and ſhews that he had denied the uſage in the Spiritual Court, and the judge had refuſed to allow his plea. The defendant traverſed the plaintiff's preſcription, and pleaded his own uſage; upon which there was a demurrer. Mr. *Eyre* urged, that though the plaintiff had by his demurrer confeſſed his preſcription to be falſe, and by conſequence that he had no right to the ſeat; yet the defendant grounding his libel below upon a cuſtom which is not triable there, he could not have a conſultation. *Vide Hetl.* 94. *Noy* 78. 2 *Jo.* 3. *Holt*, C. J. held, That if the plaintiff had not a title by preſcription, he ought not to diſturb the poſſeſſion of the defendant; and the ordinary hath conuſance of ſuch diſturbance, and may ſettle it according to uſage and poſſeſſion, unleſs there be a temporal preſcriptive title hurt by their ſentence; and the defendant might well ſue in the Eccleſiaſtical Court to have his poſſeſſion quieted, and might admit his preſcription to be tried there, as a defendant does a *modus* or a penſion by preſcription.

H. having a preſcriptive right to a ſeat in a church, and being diſturbed, may ſue in the Spiritual Court to have his poſſeſſion quieted. Vide Lutw. 1012. 5 Mod. 69, 70, 71. 1 Keb. 457.

Vide 1 Bur. 314.

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15. Galizard *verſus* Rigault,

S. C. Farreſl. 78, 79, &c. Holt 597, 50.

[Mich. 1 Ann. B. R. 2 Ld. Raym. 809. S. C.

INDICTMENT was for aſſaulting, beating, wounding, and endeavouring to raviſh the wife of *B.*, upon which the party was convicted, and afterwards the huſband brought an action of treſpaſs for the ſame cauſe; and now the party being alſo libelled againſt in the Spiritual Court for the ſame fact, *viz.* for ſoliciting her chaſtity, moved for a prohibition to the proceedings in the Spiritual Court; and it was urged for the juriſdiction of the Spiritual Court, that they may puniſh for the ſolicitation and incontinence, and that this ſuit was *pro ſalute animæ*, the other for fine and damages. *Sed per Cur.*, A prohibition was granted; for it being an attempt and ſolicitation to incontinence, coupled with force and violence, it does by reaſon of the force, which is temporal, become a temporal crime *in toto*; as if one ſay, *Thou art a whore and*

Prohibition to a ſuit againſt H. for ſolicitation of chaſtity; H. having been convicted on indictment for aſſault with intent to raviſh. 2 Lev. 63.

Palm. 379. Poſt. 692, 693. 1 Cro. 286. 1 Mod. 31. 2 Keb. 589. 1 Vent. 53. Cro. Car. 393. 1 Sid. 438.

and a thief, or *Thou keepeſt a bawdy-houſe*, which are temporal matters, the party ſhall not proceed in the Spiritual Court; whereas, if it were only, *Thou art a whore*, a libel lies in the Spiritual Court. So if it be ſaid of a woman that ſhe is a bawd only, and not that ſhe keeps a bawdy-houſe (*a*). But *per Holt*, C. J. If one commit adultery, and the huſband bring aſſault and battery, this ſhall not hinder the Spiritual Court, for it is a crimina proceeding there, and no indictment lies at common law for adultery (*b*). 1 *Roll. Abr.* 295. 2 *Inſt.* 488.

(*a*) *R. acc. Str.* 1100.

(*b*) It appears by the report in Ld. *Raymond*, that the chancellor conſented to allow a further argument by civilians; but that the prohibition ſtood, upon diſcovering a defect in the pleadings.

16. Partridge's *Caſe*.

[Mich. 1 Ann. B. R.]

Prohibition to probate of will of lands and goods, upon ſuggeſtion of non compos, denied. Mod. Caſes 239. Cro. Car. 396. 2 Rol. 315. Hard. 131.

A Prohibition was prayed to the Spiritual Court to ſtay the probate of a will, which contained a deviſe of lands and ſeveral legacies, ſuggeſting this matter, and that the teſtator *was non compos*; and the Marquis of *Wincheſter*'s caſe, 6 *Co.* 23. was relied upon: But the Court denied that caſe, and ſaid, that the ſtatute of *H.* 8. never intended to leſſen the juriſdiction of the Eccleſiaſtical Court as to the probate of wills. And to grant a prohibition might be inconvenient, for without probate the executor cannot ſue for debts, which by this means may be loſt, and the will unperformed. As for granting it *quoad* the land, it would be vain, (*Vide* 2 *Ro.* 315. 1 *Sid.* 141. this was the practice heretofore,) becauſe it is no evidence either *pro* or *con* in any court of law, but a proceeding *coram non judice*; yet it is good as to the goods (*a*).

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(*a*) In *Montgomery* v. *Clark*, 2 *Atk.* 379. Lord Chancellor *Hardwicke* ſaid he had often thought it a very great abſurdity that a will, which conſiſts both of real and perſonal eſtate, notwithſtanding it has been ſet aſide at law for the inſanity of the teſtator, ſhall ſtill be litigated upon paper depoſitions only in the Eccleſiaſtical Court, becauſe they have a juriſdiction on account of the perſonal eſtate diſpoſed of by it. He wiſhed gentlemen of abilities would take this inconvenience and abſurdity into their conſideration, and find out a proper remedy by the aſſiſtance of the legiſlature. But as the law ſtands at preſent, it is not in the power of the Court of Chancery to interpoſe, ſo as to ſtop the proceedings in the Eccleſiaſtical Court. The excluſive juriſdiction of the Eccleſiaſtical Court to decide upon fraud in obtaining wills, or the ſanity of the teſtator, ſo far as relates to perſonal eſtate, appears in *Archer* v. *Moſs*, 2 *Vern.* 8. *Nelſon* v. *Oldfield*, 2 *Vern.* 76. *Kerrick* v. *Bransby*, 3 *Bro. P. C.* 358. *Bennett* v. *Vade*, 2 *Atk.* 324.

Vide

Vide Meadows v. Ducheſs of *Kingſton*, *Amb.* 756. But if a probate is obtained by fraud, a Court of Equity will decree the executors to be truſtees for the next of kin, or to conſent to a repeal of the probate by the Spiritual Court. *Vide Tucker* v. *Phipps*, cited in *Barneſley* v. *Powell.*

The probate, if unrepealed, is concluſive evidence of the goodneſs of the will upon an indictment for forgery, *Rex* v. *Vincent*, *Str.* 481. *Rex* v. *Rhodes*, *Str* 703. With reſpect to the concluſive effect of a direct ſentence of a Court having competent juriſdiction, *vide Blackham's* Caſe, 1 *Salk.* 290., and the authorities there cited; and *Baker* v. *Pritchard*, 2 *Atk.* 387.

17. Matthews *verſus* Burdett. Hill. 1 Ann. B. R. *Vide* this Caſe, title *Univerſities and Schools.* S. C. ante 412. Poſt. 678.

18. Chambers *verſus* Sir John Jennings. S. C. Fareſl. 125.

[Hill. 1 Ann. B. R.]

A Suit by libel was in the Court of Honour for theſe words, *viz. You a knight? You a pitiful inconſiderable fellow.* And a rule was made to ſhew cauſe why there ſhould not be a prohibition: Againſt which it was urged, that there would be no remedy in this caſe, if this was not allowed. *Holt*, C. J. doubted whether there was or could be any ſuch court; but ſaid a prohibition would lie to a pretended court; and after no one precedent could be found of ſuch a ſuit for words in the Court of Honour, the prohibition went abſolutely.

Prohibition to the Court of Honour. Vide Lutw. 1053, 1054. Parliament Caſes 58 to 67. 1 Show. 353. 1 Lev. 230. 4 Mod. 128. 1 Sid. 353. 1 Keb. 310, 316, &c. Hawk. 9, 10 Lutw. 1053.

19. Anonymous.

[Hill. 2 Ann. B. R.]

PROHIBITION lies for denying a copy of the libel to any Eccleſiaſtical Court: *Nam jura Eccleſiaſtica ſunt limitata*; and the party ought to know whether the matter be within their juriſdiction, and how to anſwer. 1 *Ro. Rep.* 337. *Dighton's* caſe. *Et Mich.* 2 *Ann. B. R.* It was ſaid by *Holt*, C. J. that it was formerly held by all the judges of *England*, that when there was a proceeding *ex officio* in the Eccleſiaſtical Court, they were not bound to give the party a copy of the articles; but the law is otherwiſe: For in ſuch caſe, if they refuſe to give a copy of the articles a prohibition ſhall go *quouſque* it be given; and accordingly a prohibition was granted *per Cur. Nota tamen Paſch.* 11 *W.* 3. *B. R. Hall* moved for a

Prohibition lies to the Spiritual Court in any ſuit for denying a copy of the libel, but not to Admiralty.

See 6 Mod. 156, 308. Hob. 79, 213. 3 Bulſt. 51. Ante 548. pl. 3. 1 Vent. 252. 1 Rol. Rep. 31. Hard. 364.

prohibition to the Admiralty for refuſing a copy of libel; and it was denied *per Holt*, C. J. *Quia n'eſt ſtat.*

[554] Vide 6 Mod. 261. Poſt. 656.

20. Foy *verſus* Liſter.

[Trin. 4 Ann. B. R. 2 Ld. Raym. 1171. S. C.]

Suggeſtion in caſe of tithes muſt be proved within ſix kalendar months from teſte of prohibition. Cro. Car. 208. Stat. 2 E. 6. c. 13. § 14. Carth. 461. S. C. Caſes B. R. 206. Holt 672.

ON a *modus* ſuggeſted to pay every tenth day's n from *April* to *November*, ſkimmed and then made cheeſe, in lieu of all tithe of milk, a prohibition granted to try the *modus*, and ſettle the matter; and u ſpeaking to the goodneſs of the *modus*, theſe caſes v cited. 3 *Cro.* 609. *Mod.* 909. *Latch.* 226. 1 *Ro.* (*N.* 17. 648, 649. At laſt Mr. *Eyre* came and ſhe that the prohibition was teſted the 29th day of *No ber*, and that ſix months, *i. e.* kalendar month (as ought to be, *Noy* 30. *Hob.* 179. *Litt. Rep.* 19.) were pired the 25th day of *May* laſt, and therefore he m for a conſultation, becauſe in all that time they had proved their ſuggeſtion; and had it upon the ſta 2 *Ed.* 6. And the Court agreed, that the ſtatute tends to ſuits for ſmall as well as great tithes, and the ſix months are to be computed from the teſte of writ; and the caſe in *Moore* 573. wherein it is ſaid t muſt be ſix months in term-time, was denied. For p ing ſuggeſtions, *vide Co. Ent.* 462, 463, 4. Conſultat for not proving them, *vide Aſht.* 444. *Theſ. Brev. Note;* The entry in *Aſhton* is ill in the award of coſts, for there ought to be a judgment. *Yelv.* 1 *Brownl.* 98.

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[555] Videtit. Evidence and Witneſſes. 1 Salk. 278, 281, 286. Poſt. 691. Farrell. 129.

Proof.

Bredon *verſus* Gill.

[Mich. 8 Will. 3. B. R. 1 Ld. Raym. 219. S. C. E 3 Ld. Raym. 179.]

Commiſſioners of appeals muſt not proceed upon the depoſitions taken

ON an appeal from the commiſſioners of exciſe t commiſſioners of appeals, according to 12 *Ca* c. 23. the queſtion was, Whether the depoſitions o witn

witneſſes, and their examination written down by the clerk of the commiſſioners of exciſe, ſhould be allowed to be read in evidence on this appeal? Or, Whether the witneſſes ſhould not be brought in again perſonally, and be examined *viva voce?* The commiſſioners of appeals thought the depoſitions ſufficient, and proceeded thereupon; and a prohibition was moved for, but denied at firſt, becauſe this had been the courſe ever ſince the ſtatute, and it was a ſummary proceeding: That it would occaſion trouble and delay to the revenue to bring in all the witneſſes again; and it was but proper the commiſſioners of appeals ſhould have juſt the ſame evidence the firſt commiſſioners had. So it is in an attaint, and the law does not make *viva voce* evidence neceſſary, unleſs before a jury. In other caſes depoſitions may be evidence: If it were not ſo in this caſe, they would be to try the matter *de novo*, inſtead of trying an appeal. *Sed poſtea Paſch. 9 W. 3. B. R. mutata opinione*, the Court held, That the commiſſioners of appeal ought to examine the witneſſes *de novo* on the appeal; that it was the intent of the act, and the commiſſioners had a power given for that purpoſe, to adminiſter oaths: That this was juſt, becauſe the firſt ſentence might be by default, or the depoſitions might miſrepreſent, or not repreſent the whole caſe; and that on appeals upon orders of juſtices, examination is always *de novo*. And a prohibition was granted; but *Holt*, C. J. ſaid, his private opinion was, that if the witneſſes were dead, they might uſe their depoſitions. *Vide Fareſt.* 129. *The transfer-books of the Eaſt-India Company allowed as evidence, &c.*

before commiſſioners of exciſe, but muſt examine the witneſſes de novo, unleſs dead. See 5 Mod. 9, 277, 271. S. C. 1 Chan. Caſ. 73, 175, 186. 2 Chan. Caſ. 260. 1 Salk. 281, & 5 Mod. 211, 386. 6 Mod. 225. Comb. 414.

Vide Bur. S. C. 136. 3 T. R. 707.

Property.

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Vide 7 Co. 17. b. Kelw. 39. 4 Leon. Caſ. 201. 2 Leon. 36. 11 Co. 82.

Sutton *verſus* Moody.

[Mich. 9 Will. 3. B. R. 1 Ld. Raym. 250. S. C. Comyns 34. S. C.]

THE plaintiff brought treſpaſs for breaking his cloſe and hunting there, & *centum cuniculos ſuos adtunc & ibidem invent. occidit, cepit, & aſportavit*; verdict was for the plaintiff, and entire damages: And it was objected in arreſt of judgment, that *H.* cannot have a property in conies

H. has the property of things feræ naturæ, killed in his own grounds. Vide 11 Co. 17. b. Et poſt. 637.

667. Cro. Car. 551. Comb. 458 S. C. 5 Mod. 375. S. C. 3 Salk. 290. Caſ. B. R. 144, 145. Holt 608. Goub. 174 12 Hen. 8. 9 22 Hen. 6. 59. b.

conies which are *feræ naturæ*, unleſs on a ſpecial accoun as if he has a warren of them, then he may ſay *Quia warrenam ſuam fregit, & cuniculos ſuos cepit. Vide* 1 C. 553. *F. N. B.* 87. *Reg.* 93. *b.* 1 *Brownl.* 167. *Cur contra:* For a warren is but a franchiſe to keep them; a notwithſtanding that, the owner has no more property the conies themſelves than any man that has them in h own land; if *H.* ſtarts a hare in my cloſe, and kills h there, it is my hare; otherwiſe if he hunts her into t ground of a third perſon, then it is the hunter's. Judg ment *pro quer.*

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See 1 Salk. 330. Poſt. 597.

Quantum Meruit.

Ante 439. Same name, but a different caſe.

1. Snow *verſus* Firebraſs.

[Mich. 12 Will. 3. B. R. 1 Ld. Raym. 611. S. C.]

Quantum meruit for meat, drink, &c. uncertain as to time, well. Caſes B. R. 454. S. C. Holt 609.

THE plaintiff declared, that the defendant, in co ſideration that the plaintiff had found him ſufficie meat, drink, waſhing, and lodging, *pro diverſis menſi ultimo præteritis*, promiſed to pay him as much as he ſho deſerve, and averred that he deſerved ſo much. Up *non aſſumpſit* pleaded, and verdict for the plaintiff, it moved in arreſt of judgment, that the declaration ſhort and uncertain as to the time or number of mon *Sed per Holt*, C. J. The incertainty as to the lengt time, or number of months, can do no more harm incertainty as to the things, which has been often judged not to vitiate. It is enough to aver how muc deſerved. Judgment *pro quer.*

See 1 Show. 342. 2 Saund. 373. Raym. 8.

2. Glover *verſus* Rogers.

[Paſch. 4 Ann. B. R. 2 Ld. Raym. 1155. S. C.]

Quantum omitted, but held well.

PLAINTIFF declared that the defendant, in co ſideration that the plaintiff's teſtator had tranſpo for him ſuch and ſuch merchandizes, promiſed to pay plaintiff's teſtator *tantas denar. ſummas pro tranſportat merchandiz. prædict. rationabiliter habere meruiſſet*, and a that he deſerved ſo much. Upon *non aſſumpſit*, verdict for the plaintiff, and judgment in *C. B.* And now a

of error was brought thereupon in *B. R.* and objected that the word *quantum* was wanting, and it is not ſaid who had deſerved, and he avers he deſerved ſo much for tranſportation of merchandizes. But the Court affirmed the judgment: *Tantum* is enough, *viz.* The defendant promiſed him to pay him *ſo much he deſerved*, and *meruiſſet* ſignifies as much as *ipſe meruiſſet*; and there being but two perſons in the record, it could be nobody but the tranſporter, and they muſt have been the ſame merchandize for which the promiſe was made, or otherwiſe the plaintiff could not have had a verdict; which has cured the want of *prædict.*

Vide 1 Salk. 26. 2 Rol. 440.

3. Moverley *verſus* Ley. [558]

Vide Fareſt. 106.

[Hill. 4 Ann. B. R. 2 Ld. Raym. 1223. S. C.]

ASSUMPSIT, and declares *quod cum* the defendant, in conſideration that the plaintiff would provide him meat and drink, promiſed to pay him as much as the plaintiff *habere meruit*, and avers that he deſerved ſo much. There were alſo other counts. *Non aſſumpſit* was pleaded, and verdict for the plaintiff, and entire damages. Upon motion in arreſt of judgment it was objected, that *meruit* ſhould have been *meruerit*. The Court held at firſt, that this was not falſe *Latin*, but falſe ſenſe, which is not cured by a verdict; and though a daſh would help it, yet they could not by intendment ſupply a daſh, for that was to make another word. This was moved ſeveral times, and having reſted two terms, the Court gave judgment for the plaintiff, ſaying, they muſt take the words of the declaration to be the very words of the promiſe, as if the words of the promiſe had been put in writing thus by the parties under their hands: in which caſe the Court ought not to purſue a grammatical ſenſe or conſtruction, which makes the promiſe void, but to conſtrue it ſo as to make the parties mean ſomewhat, as it is plain they did, and that was to pay *tantum quantum habere meruerit.*

To be taken according to the intent of the parties.

Fareſt. 106. 2 Ld. Raym. 835.

Vide 1 Saik. 43, 44. Lutw. 1084 to 1130.

Quare Impedit.

[*Vide* title *Preſentation.*]

1. Berkely *verſus* Hanſard.

[Mich. 3 W. & M. B. R. Rot. 569.]

In quare impedit nonſuit after appearance is peremptory. Co. Lit. 139. a. 1 Brownl. 161.

IN a *quare impedit* againſt *A.* and *B.* and the biſhop, *A.* and *B.* made title, and the biſhop pleaded that he claimed nothing but as ordinary. The biſhop died, *A.* came and furmiſed this upon the roll, and prayed the plaintiff might reply; upon this an entry was made, *Quod prædict. quer. licet ſolemniter exactus non venit, nec eſt proſecutus breve ſuum præd. ideo conſideratum eſt, &c. & breve epiſcopo.* Upon this a writ of error was brought, and the judgment was affirmed: for it is a nonſuit after appearance, which in a *quare impedit* is peremptory. *Vide* 7 *Co.* 27. *b.* 2 *H.* 4. 1. *b.* 14 *H.* 7. 19. *b.*

S.C. 3 Lev. 37, and 382, 4 Mod. 200. Parliament Caſes 164. Comb. 295, 300. Carth. 313. 1 Show. 413, 441, 493. Holt 585.

2. Dominus Rex & Domina Regina *verſus* The Biſhop of London *and* Dr. Lancaſter.

[Trin. 5 W. & M. B. R.]

In caſe of a prerogative turn the writ is general, quæ ad noſtram ſpectat donationem.

IN the great caſe of the *quare impedit* for the church of *St. Martin's in the Fields*, the defendant prayed *oyer* of the writ, and pleaded in abatement variance between the writ and the count; the firſt being *quæ ad noſtram donationem ſpectat*, the latter *quæ ad ſuam donationem ſpectat jure prærogativæ:* And on demurrer it was objected, that the title by the writ is a title in fee, this in the count is only a turn *pro hâc vice; ſed non allocatur;* for the precedents are ſo, and the writ is always general. *Shower pro def.* Suppoſe then the king ſhould have judgment by default, and a writ to the biſhop, would this gain a general title to the crown, and become a uſurpation? *Holt*, C. J. No; for where the king hath judgment by default in a *quare impedit*, he, as well as a ſubject, muſt by ſuggeſtion on the roll ſet forth his ſpecial title. *Reſpondeas oyſter* awarded.

3. Dominus Rex *verſus* The Biſhop of Cheſter, Pierce *and* Cook.

[Hill. 9 Will. 3. B. R. 1 Ld. Raym. 292. S. C.]

IN a *quare impedit* the plaintiff declared, that Q. *Elizabeth*, on the 14th day of *February*, in the 12th year of her reign, was ſeiſed of the advowſon of *Bedel*, *ut de uno groſſo*, and preſented *Syms*: That the queen died, and it deſcended to K. *James*, and he was ſeiſed *ut de groſſo*: So to K. *Charles*, and that he was ſeiſed *ut de groſſo*, and preſented *Wickham*; and that afterwards *Wickham* died, and one *J. Peirce*, *non habens jus*, *ſed uſurpando præſentavit Metcalfe*: That K. *Charles* I. died ſeiſed, and it deſcended to K. *Charles* II. *&c.*

King's grant of an advowſon. Vide Hob. 143. 3 Co. 4, 5. 10 Co. 101. Owen 43. 1 Leon. 21, 201, 277. 6 Co. Doughty's Caſe. 5 Mod. 287, 335, 336, 297. S. C. Carth. 440. S. C. Parl. Caſes 212. 3 Lev. 377. 4 Mod. 200. Hob. 224, 233. Mo. 413. 2 And. 32, 36, 154. 3 Saik. 24, 40. Caſ. B. R. 185. Show. P. C. 212. Skin. 651.

Defendant pleads that K. *Charles* I. was ſeiſed in groſs; but that he, after his preſentation of *Wickham*, by letters patent, granted the advowſon aforeſaid to one *Thackſton*, *adtunc armigero*, *poſtea militi*.

Et quod prædicto tempore quo Peirce is ſuppoſed to have uſurped *ſuper dominum regem*, *ipſe idem Peirce uſurpavit ſuper dict. W. Thackſton*, and preſented *Metcalfe*: *Et quod poſtea* the ſaid *Thackſton* releaſed the advowſon, and his right therein, to him the ſaid *J. Peirce* and his heirs, and traverſes the dying ſeiſed of K. *Charles* I.

The attorney-general prayed *oyer* of the letters patent, which reciting that Q. *Elizabeth*, in the 13th year of her reign, granted the manor of *Bedel*, with the advowſon *adinde ſpectan.* to the earl of *Warwick*, and that the ſaid manor was come to Sir *W. Thackſton*, Knt. *ſciatis igitur nos dediſſe & conceſſiſſe præfato Will'o Thackſton mil. advocationem eccleſiæ prædict.*, and thereupon demurred to the plea. Judgment was given in *C. B.* for the king, and a writ of error brought; and thereupon it was objected, that the advowſon which the king meant to paſs, was an advowſon which Q. *Elizabeth* granted to the earl of *Warwick*, and that the ſaid grant to the earl of *Warwick* was void; for the queen, *anno* 12 *regni ſui*, being ſeiſed of this advowſon *ut de groſſo*, could not *anno* 13. grant this as an advowſon appendant, and that this is admitted by the defendant: And if this was an advowſon in groſs, and ſo deſcended to *Charles* I. his confirmation or grant to *Thackſton* upon a ſuppoſal wherein he was deceived, will be void; and that the ſaid *W. Thackſton* in the letters patent, and the *W. Thackſton* in the grant, appear to be different perſons. On the other ſide it was urged, that the queen might be ſeiſed of this advowſon as in groſs at the time ſhe preſented, and at the time ſhe died, and yet might be

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ſeiſed of it as appendant when ſhe granted it to the earl of *Warwick*, for ſhe might have the advowſon again after the grant to the earl of *Warwick*, and then preſent; and that the Court ought to intend every thing to make the king's grant good. To clear this, the Chief Juſtice, *Rokeby* and *Eyre*, Juſtices, held,

Sufficient to lay ſe ſin tempore pacis, tempore domini regis.

1ſt, That the time of the ſeiſin laid in the count was immaterially alleged, for it is ſufficient to ſay, *tempore pacis*, *tempore dominæ reginæ*, and therefore it is not traverſable: In treſpaſs *quare*, &c. it is neceſſary to lay a certain time; yet even there the preciſe time is not material nor traverſable, but any time before the ſuing of the writ may be given in evidence, *à fortiori* here, &c.

That which is immaterial is not admitted by not being traverſed. 1 Vent. 127. 2 Saund. 2 5, 180. 1 Lev. 52. 2 Lev. 112. 1 Mod. 72. Vide Str. 298.

2dly, That which is not material nor traverſable is not admitted nor confeſſed when it is alleged, and not traverſed. *Ergo*, as the plaintiff, upon *non preſent. modo & forma*, might give in evidence a preſentation any time, ſo the Court may intend it. *Vide* 1 *Inſt.* 352. *Hob.* 71. 2 *Leon.* 99.

In grants where the king's intent appears to paſs the thing, it ſhall paſs notwithſtanding falſe recitals. Vide Heb. 143, 229, 230 3 Co. 4, 5. 5 Co. 93. 3 Lev. 40. 1 Co. 43. a. 8 Co. 56.

3dly, The grant of the queen, as recited, is ſaid to be *inter alia*, ſo there may be other words which are ſufficient to paſs an advowſon in groſs to the earl; and the intent of K. *Charles* I. is plain, and this conſideration might be ſufficient, as the relinquiſhing of a ſuit againſt the king, or the ſurrender of a void patent is a good conſideration for a new grant. And as to the recitals, which were not all anſwered, *Holt*, C. J. ſaid, Where it appears by the recitals the king intended not to paſs any thing he had an apparent right in, but only what was concealed, the recital will qualify the grant; which is *Legat*'s caſe. 10 *Co.* But where there are words in the grant which ſhew the king deſigned to paſs the land, though they were not concealed, there the grant ſhall be good to paſs the lands. *Hard.* 231.

Grant to a knight by the name of eſquire, is void. See 2 Inſt. 668. 16 H. 6. 28. 18 H. 6. 8. 6 Co. 27. Litt. R. 81. Hard. 128. 1 Sid. 40 Fareſl. 38. 2 Inſt. 582, 594, 666. 2 Cro. 679. Litt. Rep. 121. 1 Bulſt. 21. 4 H. 7. 7. 32 H. 6 29. 8 Ed. 4. 23. 2 Inſt. 594. Hut. 41. 9 Rep. 40. 2 Cro. 240. 1 Bulſ. 21.

4thly, *Holt*, C. J. *Turton* and *Eyre*, Juſtices, held, that *William Thackſton*, Eſq. in the plea, could not be *W. Thackſton*, Knt. mentioned in the letters patent, for eſquire is drowned in the name of knight, ſo that a knight cannot be an eſquire; and a grant to *A. B.* Knt. is abſolutely void, if *A. B.* be only an eſquire. Knight is a name of dignity, and parcel of a man's name, as much as his Chriſtian name. It was ſaid that it ſhould have been averred, that *W. Thackſton* was *revera* an Eſq., but *cognit.* & *reputat. miles* at the time of the grant; but that would not have aided it, for a man cannot be a knight by reputation, for there can be no foundation for ſuch a reputation; and it is not the party's ſaying in his plea, *I am the man*, that will explain the grant, but the identity muſt appear on the face of the grant itſelf. Upon this the judgment was affirmed by *Holt*, C. J. *Turton* and *Eyre*, Juſtices;

tices; but *Rokeby*, J. held, that there was a ſufficient *demonſtratio perſonæ*, and that it ought to have been reverſed (*a*).

(*a*) This judgment was reverſed in the Houſe of Lords; *Sho. P. C.* 212. It was obſerved for the plaintiff in error, that, in caſe of grants, any deſcription of the perſon is ſufficient; and that it is the identity of the perſon which the law doth moſt regard and value. *Vide* the argument in *Shower*, where the ſeveral points ariſing on the caſe are elaborately diſcuſſed.—The injuſtice which might reſult from the doctrine that an error in the deſcription of a perſon would avoid a grant, and that the identity could not be ſhewn, would in the preſent ſtate of *Engliſh* juriſprudence prevent that doctrine from receiving much encouragement.

Due Eſtate.

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See Co. Lit. 303. 3 Lev. 19. 1 Lev. 190. 1 Salk. 363. 1 Mod. 231.

Scilly *verſus* Dally.

[Paſch. 10 Will. 3. B. R. Inter Hill. 9 Will. 3. B. R. Rot. 747. 1 Ld. Raym. 331. S. C.]

See 5 Mod. 150. Poſt 629. 1 Lev. 190. 1 Sid. 298. 2 Sid. 10. Comb. 476. S. C. Carth. 444. Caſes B. R. 190. Holt 610.

IN *replevin* the defendant avowed and ſet forth, that *J. S.* was poſſeſſed of a meſſuage and 40 acres of land, ſetting out the time of the commencement of the leaſe, and demiſed, rendering rent, *&c.* And that he being poſſeſſed of the reverſion died, and it came to his executor, and for rent-arrear he avowed. The plaintiff demurred, and ſhewed for cauſe that the avowant had not ſhewn who was leſſor of *J. S.*: And for this it was held naught *Per Holt*, C. J. In debt for rent it is enough to ſay *dimiſit*: And if it be brought againſt an aſſignee, that he demiſed to ſuch a one, whoſe eſtate the defendant hath, is enough for the leſſor or his executor, (*quære tamen* of the heir,) without making a good title to himſelf; yet an avowry differs from a declaration in many reſpects (*b*). In a declaration

Commencement of particular eſtate muſt be ſhewn. 1 Mod. 231. 2 Mod. 143, 144. 2 Show. Caſ. 426. Lutw. 80, 81. 5 Mod. 206. 3 Mod. 48. Cro. Jac. 418. 2 Vent. 182. 3 Lev. 193. Raym. 319. 2 Keb 87, 96. 1 Sid. 279. Show. 64. 3 Lev. 133. Diverſity between counts and avowries.

(*b*) By ſtat. 11 *Geo.* 2. ch. 19. § 22. defendants in replevin may avow or make cognizance generally that the plaintiff in replevin, or other tenant of the lands and tenements whereon the diſtreſs was made, enjoyed the ſame under a grant or demiſe, at ſuch a certain rent, during the time wherein the rent diſtrained for incurred; which rent was then and ſtill remains due; or that the place where the diſtreſs was taken was parcel of ſuch certain tenements, held of ſuch tenure, *&c.*; for which tenements the rent, *&c.* was at the time of the diſtreſs, and ſtill remains, due; without further ſetting forth the grant, tenure, demiſe, or title of ſuch landlord, *&c.*

claration

claration in debt for rent, *nil debet* is a good plea, and traverſes the whole declaration; but there can be no general iſſue to an avowry, but ſome ſpecial point muſt be traverſed; and therefore, becauſe it does not appear out of what eſtate, or in what manner this term was derived, judgment muſt be for the plaintiff. *Vide Cro. Car.* 571. The reaſon why the commencement of particular eſtates muſt be ſhewed in pleading, is, becauſe they are created by agreement out of the primitive eſtate; and the Court muſt judge whether the primitive eſtate and agreement be ſufficient to produce the particular eſtate claimed: And this is a fundamental rule, which ought not to be broken upon fancied inconveniencies (*a*).

John v. Witney, 3 Will. 65. Eaſter 10 Geo. 3. C. B. Same point; and this caſe of Sully v. Dally held to be good law. See Cro. Car. 138. Yelv. 74, 147. 3 Mod. 132. Lutw. 1492, 1497.

(*a*) This judgment was affirmed in *Dom. Proc.* 1 *Bro. P. C.* 77.

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[563] Recognizance, Statutes, Elegit, Extent, &c.

Vide Fareſt. 38, 97. Hob. 196. Cro. Car. 148. Cro. Jac. 2, 12, 449, &c. Vide Cro. Car. 241, 149.

1. Hammond *verſus* Wood.

[Trin. 3 W. & M. B. R.]

Conuſee cannot aſſign his intereſt after extent and liberate, if conuſor continues in poſſeſſion. Vide Fareſt. 38, 97. Cro. Jac. 3, 12, 449. 1 Show. 281. 3 Lev. 312. 1 Vent. 42. 4 Mod. 48. S. C. 2 D. 166 p. 16. Skin. 300. Holt 611, 263.

THE conuſee of a ſtatute had lands extended and delivered to him upon a *liberate*: The conuſor being in poſſeſſion, continued his poſſeſſion; afterwards the extended intereſt was aſſigned; and the queſtion was, Whether it was aſſignable? The Court held not: It was objected, that before entry by the conuſee, this was like an *intereſſe termini*, or the intereſt of one that has a leaſe to commence at a future day, which is aſſignable; ſo here the conuſee hath an eſtate before entry. *Sed per Holt*, C. J. By return of the extent an intereſt veſted in the conuſee: The end of the *liberate* is to have an actual poſſeſſion of the intereſt; and it muſt be taken that he has by the return of the *liberate*; the ſheriff returning thereupon *liberari feci*, the conuſee is eſtopped to ſay otherwiſe: If then the conuſor continues to keep poſſeſſion after this return, the conuſee's eſtate is turned to a right, like the caſe of diſſeiſee making continual claim, as ſoon as ever the diſſeiſee leaves the premiſes, the continuance of poſſeſſion

ſion by the diſſeiſor makes a freſh diſſeiſin. *Vide* 1 *Inſt.* 156. *Lit.* 129. And this is not like the caſe of mortgagor, who continues in by conſent, and not in oppoſition to the mortgagee.

2. Putten *verſus* Purbeck.

Vide Cro. Jac. 12.

[Trin. 12 Will. 3. B. R. 1 Ld. Raym. 346, 718. S. C.]

On elegit, if the ſheriff deliver more than a moiety, the execution is void. 1 Vent. 259. S. C. Cases B. R. 355. Carth. 453. S. C. 1 Sid. 91, 239.

TO a *ſcire facias* upon a judgment, the defendant pleaded in bar, that the plaintiff had before ſued an *elegit* on the ſame judgment, directed to the ſheriff, who thereupon returned an inquiſition taken, and a delivery of ſuch certain parcels thereof (*a*). [*Et nota*, the parcels amounted to more than a moiety,] and prayed judgment, if the plaintiff ſhould have any other execution; to which it was demurred; and the Court held that the execution was merely void; for the ſheriff had only a circumſcribed authority, and had exceeded it; and if the plaintiff had brought an ejectment, he could not have recovered the poſſeſſion on this title, and therefore ſhould be at liberty to purſue a more effectual execution.

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(*a*) Separate lands may be extended, provided they do not appear to amount in value to more than a moiety of the whole. *Den* v. Ld. *Abingdon*, *Doug.* 472.

3. Domina Regina *verſus* Ewer.

[Paſch. 1 Ann. B. R. 2 Ld. Raym. 756. S. C.]

Certiorari to remove an indictment not a ſuperſedeas, unleſs recognizance entered into in 20*l.* Vide 1 Salk. 147, 148, 149. Fareſl. 9, 120, 121. S. C. 3 Salk. 369. Holt 612. Vide Str. 1165. Bur. 10.

A *Scire facias* was brought on a recognizance taken before a judge upon granting a *certiorari* to remove an indictment from the ſeſſions of the peace, which upon *oyer* was entered *in hæc verba*, and was for 40*l.*, whereas the ſum preſcribed by the ſtatute is 20*l.* *Et per Holt*, C. J. Before 5 & 6 *W.* & *M. c.* 11., any judge might take a recognizance, which is not taken away; but if it be not according to the ſtatute, which is in 20*l.*, the *certiorari* will be no *ſuperſedeas*; yet whether it be or no, it is ſtill good as a recognizance at common law.

Vide poſt 600, 659. 6 Mod. 42. 2 Leon. 24.

4. Shuttle *verſus* Wood.

[Mich. 2 Ann. B. R. 2 Ld. Raym. 966. S. C. by the name of Phettle *v.* Wood.]

In C. B. if recognizance be taken at a judge's chamber, it muſt be ſo declared on; but in B. R. as if taken in court. Vide Hob. 196. March 159. 6 Mod. 42, 132. S. C. Alcyn 12. 3 Cro. 312. S. C. 3 D. 314. p. 6. Holt 612. 2 Cro. 450, 645. Cro. Car. 481.

IN *debt* on a recognizance of bail in *C. B.*, the plaintiff declared that the defendant *per ſcriptum ſuum obligatorium recognit. in curia dictæ dominæ reginæ de Banco coram Thomæ Trevor mil. & ſociis ſuis, &c.* Defendant pleaded *nul tiel record:* the recognizance certified, appeared to be taken before Mr. Juſtice *Nevel*, at his chambers. *Et per tot. Cur.* The plaintiff hath failed of his record, and hath varied in his deſcription from the recognizance. *Et per Holt*, C. J. If it had been entered as taken in court, then it had been well enough. In this court the courſe is always to enter them as taken in court, though taken actually by a judge in his chamber, and in this court they are not taken in a ſum certain, as in *C. B.*, neither are they a record till entered; but in *C. B.* it is a record immediately upon the firſt caption, and binds the lands before it be filed at *Weſtminſter*, and when it is filed, then it is a record in court, and a *ſcire facias* or debt lies upon it, either in *Middleſex* where filed, or in *London* where taken; whereas on a recognizance in this court of *B. R.* the action or *ſcire facias* muſt always be brought in *Middleſex*.

Vide Lut. 1287. Barnes 96, 207. 2 Bl. Rep. 709. 1 Bur. 409.

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Records.

See 2 Saund. 254, 393. 6 Mod. 18, 245, 257. S. C. 5 Mod 8, 9. Holt 613. Vide 1 Sid. 429. 6 Mod. 103. Lutw. 332. 2 Salk. 298.

1. Waites *verſus* Briggs.

[Mich. 6 W. & M. B. R. 1 Ld. Raym. 35. S. C.]

In eſcape the plaintiff did not allege the commitment prout patet per recordum, but well on general demurrer. Vide 3 Lev. 311. 1 Lutw. 111. See now the ſtat. 4, 5 Ann. c. 16. 1 Keb. 761.

IN *debt* for an eſcape the plaintiff declared the priſoner was committed and eſcaped, and becauſe he did not ſay *prout patet per recordum*, the defendant demurred generally; but the plaintiff had judgment; for the giſt of the action was the eſcape, and the commitment only inducement. *Et per Holt*, C. J. In debt on a judgment *quod cum recuperaſſet*, is good without a *prout patet per recordum*; and the defendant may plead *nul tiel record*. *Et per G. Eyre*, J. The matter here is grounded on the fact, for *nil debet* is a good plea, and not on the matter of record.

And

And the rule in *Co. Lit.* 303., where the difference is taken between caſes, where the record is the very foundation, and where inducement is a good diverſity. *Vide* 1 *Sid.* 16. Judgment for the plaintiff.

1 Lev. 137. 1 Sid. 216. Hob. 210. 1 Saund. 336. 1 Salk. 238. Hob. 233. Show. 4. Fareſt. 53. Vide Str. 1226.

2. Dominus Rex *verſus* North.

[Hill. 8 Will. 3. B. R.]

PER Holt, C. J. It is an error in the clerks in *London*, that upon a *certiorari* they return only a tranſcript, as if the record remained below; for in *C. B.*, though they do not return the very individual record, yet the tranſcript is returned as if it were the record, and ſo it is in judgment of law.

Upon a certiorari the very record is returned. 6 Mod. 188.

3. Thompſon *verſus* Leach.

[Paſch. 9 Will. 3. B. R.]

S. C. ante 427. Poſt 576, 618, 675.

PER Holt, C. J. You ought not to move to read a word of a record, in order to make a *conſilium*, where the roll is of a precedent term, unleſs it be filed; for you ought not to have a looſe roll, unleſs it be a roll of that term of which it ought to be a record.

Roll of precedent term ought to be filed. Vide 3 Lev. 219. S. C. Eq. Ab. 178. p. 3. 3 D. 164. p. 13. 3 Salk. 300. 1 Show. 296. 3 Mod. 296, 301. 3 Lev. 284. Show. P. C. 150. 2 Vent. 198. Comb. 488, 468. Carth. 211, 250, 435. Holt 357, 623, 665. Caſes B. R. 475.

4. Moor *verſus* Manucapt. Garret. [566]

[Mich. 10 Will. 3. B. R.]

A *Scire facias* againſt bail; the defendant pleaded, that no *capias* iſſued forth againſt the principal; the plaintiff replied and ſet out the *capias prout patet per recordum*, &c. Defendant rejoins *nul tiel record*. Plaintiff ſur-rejoins, *habetur tale recordum*, and prayed that the Court will inſpect the rolls, &c. The defendant demurs, and the Court held this demurrer was ill: Upon *nul tiel record* pleaded, where it is a record of another court, the other party replies, *quod habetur tale recordum*, and the Court gives him a day to bring it in: But if *H.* pleads a record of the ſame Court, the other ſide may crave *oyer*, &c. (*a*), or may plead *nul tiel record*, and then there are two ways of proceeding in ſuch caſe; for either the Court may give the party a

Upon nul tiel record pleaded of record of the ſame court, day may be given to the party to bring it in, or for the juſtices to inſpect the record; but defendant cannot demur. Vide 3 Lev. 243. S. C. Caſes B. R. 214. Holt 558.

(*a*) *Vide* 1 *T. R.* 150. *contra.*

day

day to produce the record; which entry is, *et dictum eſt præfato defendenti, quod habeat recordum hic tali die ſub ſuo periculo, &c.*, or the Court may give day to inſpect the record themſelves. *Et quia juſticiarii hic ſe adviſare volunt ſuper inſpectione & examinatione recordi per prædict. defendentem ſuperius allegati dies datus eſt partibus prædict. hic uſq; &c. Vide Dy.* 228.

But in the principal caſe, what does the defendant do by his demurrer, but deny that the Court can inſpect the records in the Court before them? which they may moſt undoubtedly; therefore judgment muſt be given againſt him.

5. Anonymous.

[Trin. 11 Will. 3. B. R.]

Printed ſtatute not evidence upon nul tiel record. 3 Lev. 243. Vide Str. 446. 3 Salk. 330. Sty. 122, 155, 462.

IN an action againſt *H.* defendant pleaded the compoſition-act; the plaintiff replied *nul tiel record;* upon the day given to bring in the record the defendant brought in the printed act. *Et per Holt.* C. J. An act printed by the king's printers is always allowed good evidence of the act to a jury (*a*); but was never allowed to be a record yet: You muſt get an exemplification under the Great Seal, and then plead it exemplified, and then no man can deny it.

(*a*) *Bull. N. P.* 225. In private acts of parliament the printed ſtatute-book is not evidence, though reduced into the ſame VOLUME with the general ſtatutes; but the party ought to have a copy compared with the parliament-roll, for they are not conſidered as already lodged in the minds of the people. However, a private act of parliament in print that concerns a whole county, as the act of *Bedford* Levels, for building *Tiverton*, &c. may be given in evidence, without comparing it with the record. And theſe things are the rather admitted, becauſe they gain ſome authority from being printed by the king's printer; and beſides, from the notoriety of the ſubject of them, they are ſuppoſed not to be wholly unknown: and, for this reaſon, printed copies of other things of as public a nature have been admitted in evidence, without being compared with the original; and the printed proclamation for a peace was admitted to be read, without being examined by the record in Chancery. A gazette which contains any thing done by his majeſty in his character of king, or which has paſſed through his majeſty's hands, is admiſſible evidence in a court of law to prove ſuch thing. *Rex* v. *Holt*, 5 *T. R.* 436. *Vide* form of pleading an exemplification, 8 *Co.* 8. *b.*

6. Turner *verſus* Barnaby.

[Trin. 2 Ann. B. R.]

IN *ejectment*, the defendant being called to confeſs leaſe, entry, and ouſter, made default, and that default was recorded. Afterwards the plaintiff would have waived it, ſuppoſing the record of it to be in the breaſt of the Court during the * term. *Et per Holt*, C. J. There is a diverſity between an act of the Court done upon record, for that is in the breaſt of the Court, and may be altered by them during the term, and an act of the party recorded by the Court, as a nonſuit or default; for that once recorded, cannot be altered by the Court; for that would be a means of introducing falſity in matter of fact into records.

Act of the court upon record may be altered the ſame term, of the party, not. S. C. Ante 250. Poſt 649. See Ray. 69. 3 Lev. 219.

* [567]

Common Recoveries.

Vide 1 Co. 14, 61. 2 Co. 74. 5 Co. 40. Lit. R. 234. 2 Lev. 31. 2 Mod. 70. Latw. 1549. Poſt 591.

1. Sir John St. Albans's *Caſe*.

[Trin. 1 W. & M. C. B.]

SIR *John* St. *Alban*'s being of the age of nineteen years, his ſiſter, who was the next in remainder, and alſo his heir, married one of his footmen. He petitioned the king for leave to ſuffer a common recovery, who referred it to the judges of the Common Pleas, before whom ſeveral precedents of recoveries, ſuffered by infants upon privy ſeals, were cited, *viz.* One *Bivarny*, the 1ſt day of *June*, 1 *Car.* 1. One *Young*, the 23d day of *November*, 11 *Car.* 1. Another, 13 *Car.* 1. Another, 14 *Car.* 1. Another, *Jac.* 2. Another, 4 *Jac.* 2., by *Toby*. Another, *Jac.* 2. Another, by *John Croke*, ſon of Sir *John Croke*, 10 *Car.* 2. The judges obſerved, that ſeven of the petitions were by fathers upon the marriage of their ſons, and an equal recompence given; whereas here was neither father nor marriage in the caſe; and they ſaid this caſe had been carried too far already, therefore diſallowed it. *Vide Hob.* 196. 1 *Ro.* 731. 1 *Cro.* 307. (*a*)

Recovery ſuffered by an infant. 1 Sid. 321. 2 Keb. 141. Styl. 246. Cro. El. 321. 1 Mod. 48, 246, 247. 3 Lev. 36. 1 Vent. 69. 2 Vent. 30, 90.

Vide 1 Vern. 461.

(*a*) Common recoveries ſuffered by privy ſeal are now diſuſed, and private acts of parliament are univerſally ſubſtituted in their ſtead. 2 *Craiſe* 81.

2. Clithero *verſus* Franklin & Ux

[Paſch. 2 W. & M. C. B. Rot. 207.]

To A. and his wife for life, remainder to the heirs male of A. on the wife begotten; A. cannot dock this during the wife's 8. C. Lilly Ent. 92, 523.

IN a *writ of ayel* the iſſue was, Whether the gran died ſeiſed in fee? The jury found that the g ther covenanted to ſtand ſeiſed to the uſe of himſ *Mary* his wife for their lives, remainder to the hei of the grandfather on the body of the ſaid *Mary* be with remainders over. The grandfather ſuffered a c recovery, and died; *Mary* ſurvived. To prove th very void [*good*], it was inſiſted, that *Owen* and *M* caſe (*a*) was not law; for if baron and feme had tierty, then each had the whole, and the baron make a tenant to the *præcipe* for the whole. *Pe contra*, That caſe was never yet queſtioned; the eſtate hinders the intail from executing in the ba that it is only a kind of contingent eſtate after the d the wife, and the intail cannot be tacked to the eſ life of the huſband, during the life of the wife; during her life there is an intervening eſtate; and ingly adjudged. 3 *Co.* 6. *Plo. Manxlo*'s caſe 8, 9. 320. 1 *Sid.* 83. (*b*)

(*a*) 3 *Rep.* 5. *a.*

(*b*) In this caſe the recovery muſt have been (as in *Owen* v. *Morgan*) with ſingle voucher, and the grandfather tenant to the *præcipe*; ſo that part of the freehold being veſted in the wife, the recovery could not be valid. But if the grandfather had conveyed the eſtate to a tenant without the concurrence of his wife, and come in as vouchee, it would have been ſufficient. *Cappledike*'s caſe, 3 *Rep.* 5. *Fitz William*'s caſe, 6 *Rep.* 32. *Hallett* v. *Saunders*, 2 *Lev.* 107. Even in caſes where the immediate inheritance in tail is veſted in the wife, the huſband may convey the freehold by deed, and make a good tenant to the *præcipe*; *Cruiſe* on Recoveries, 29. *Buſl. n. Co. Lit.* 325, *b.* *Pigott* 72. *Gilb. Ten.* 108. *Co. Lit.* 273. *b.* If there are two joint-tenants, and a recovery is ſuffered againſt one of them, it is good for a moiety, Marquis of *Winchester*'s caſe, 3 *Rep.* 1. Upon a limitation to a man and woman who afterwards intermarry, they take by moieties, *Hallett* v. *Saunders, ubi ſup.* By ſtat. 14 *Geo.* 2 it is not neceſſary to obtain ſu from leſſees for lives in order tc good tenant to the *præcipe*; but tenant for life, or other great expectant on the determinatior leaſes, muſt join in conveying for life to the tenant. *A.*, te 99 years, remainder to truſ preſerving contingent remainc mainder to the firſt and othe *A.* in tail, *A.* and his eldeſt ſc in fine to make a tenant to the it was held that the fine of te years was void, and ſo no freeh veyed; *Dormer* v. *Packhurſt*, 135. 4 *Bro.* 405. *A.* tenant remainder to *B.* in tail; *B.* r in ejectment againſt *A.*, and poſſeſſion by feoffment made C to the *præcipe*, and ſuffered a r *A.* in a ſubſequent ejectment r againſt *B.*, and it was ruled feoffment of *B.* did not co eſtate of freehold to ſupport covery; *Atkyns* v. *Horde*, 1 5 *Bro.* 241. *Cowp.* 689.

3. Lloyd *verſus* Evelin.

S. C. 1 Show. 347.

[Paſch. 5 W. & M. B. R.]

IN a *writ of error* of a common recovery, the tenant to the *præcipe* in the common recovery was made by a fine; the recovery was ſuffered, and the fine was reverſed, yet it was held a good recovery; for there was a tenant to the *præcipe* at the time.

Tenant by fine, &c. Vide Noy 126. 1 Mod. 170, 262. Vide Skin. 3, 63. Butl. Co. Lit. 203. b. n. 1. Cruiſe 26.

4. Lacy *verſus* Williams.

S. P. 1 Show. 347. 1 Mod. 218.

[Trin. 11 Will. 3. B. R. 1 Ld. Raym. 227, 475. S. C.]

ERROR of a judgment in *C. B.* in ejectment, wherein a ſpecial verdict was found, *viz.* that a writ of entry was brought againſt *Miles Corbet*, *ret. Quindena Martini.* That upon the return *Miles Corbet* appeared, and the demandant counted againſt him, that he vouched *Lacy* the tenant in tail, and a ſummons *ad warrantizandum* iſſued, returnable *octabis purificationis.* After the *teſte* and before the return of the writ of ſummons, *viz.* the 1ſt day of *January*, *Lacy* the tenant in tail conveyed to *Miles Corbet* by leaſe and releaſe for life. At the return of the ſummons, *Lacy* the tenant in tail appeared and entered into the warranty, and vouched over the common vouchee, and ſo a common recovery was had. This recovery being held good in *C. B.* ſerjeant *Pratt*, for the plaintiff in error, inſiſted, that *Miles Corbet* was not tenant to the *præcipe* at the return of the writ of entry. He agreed that if he had purchaſed before the return of the writ of entry, the recovery had been good, (otherwiſe if after, as in this caſe,) to bind ſtrangers or the iſſue in tail, though it might be good between the parties by way of eſtoppel. *Vide* 1 *Ro.* 868. 21 *E.* 3. 5. 5 *H.* 6. 1. 18 *E.* 4. 26. 9 *E.* 4. 12. 3 *H.* 6. 34. *Ratio eſt*, becauſe the tenant could not render the lands at the return of the writ of entry, and a voucher ſuppoſes a ſeiſin; for it is a good counterplea that the voucher had nothing in the lands at the time of the voucher, and the *nec unquam poſtea* is not material; and if the tenant pleads not *non-tenure* as he ought and might, that only binds himſelf and thoſe that are parties and claim under him by eſtoppel.

If tenant gain the freehold at any time before judgment, good. Vide Cro. Jac. 455. Lutw. 1549. Carth. 472. S. C. Comb. 425. Caſe. B. R. 261. Holt 614.

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Kene contra argued, that the iſſue ſhall be bound where he may have execution for the value. 3 *Co.* 5, 6. 12 *E.* 5. 19. And it is not a ſufficient counterplea of a voucher to ſay, the voucher had nothing *tempore*, &c. without adding *nec unquam poſtea*, *Raſt.* 367, 126. So it is of *non-tenure*,

tenure, *Raſt.* 273. Where the tenant appears on the return of the writ of entry, and a recovery is then had, in ſuch caſe the tenant muſt have the freehold at the return of the writ, becauſe it is a recovery then ſuffered; but otherwiſe where there is a voucher over, or interpleader, as in this caſe; for it is ſufficient if he become tenant before judgment. 41 *E.* 3. 5. 8 *E.* 3. 32. 10 *E.* 3. 21.

1 Roll. Abr. 865.

Brook, Brief, pl. 75, 77. 1 Inſt. 102, 365. Hob. 21. Non-tenure cured by ſubſequent purchaſe. Q. 1 Mod. 218. 1 Show. 347. Lutw. 1549. Poſt 601. 2 Lev. 29, 55. 2 Lutw. 1548.

Holt, C. J. It is not enough in a counterplea of a voucher to ſay, the voucher had nothing in the lands at the time of the voucher, without *nec unquam poſtea*; ſo it is of *non-tenure*: If the tenant to the *præcipe* gains a freehold before judgment, it is ſufficient, for it cannot be ſaid to be a recovery againſt him that had nothing; therefore a writ may be made good by a ſubſequent purchaſe, and ſo may a voucher; and it is the more reaſonable, becauſe the demandant may have a good cauſe of action, though the tenant have not the land; for it is not his being tenant to the *præcipe*, but the demandant's having a right to the land, that is the foundation and cauſe of action; and therefore it is in law ſufficient, if the tenant have the land to render at any time before judgment (*a*). And the judgment was affirmed *niſi cauſa*. Afterwards Mr. *Squib* came to ſhew cauſe why the judgment ſhould not be affirmed, and cited 18 *E.* 3. 13. 18 *E.* 4. 26. 2 *Ro.* 746. *Sed non allocatur*: And *Holt*, C. J. ſaid, The recompence in the caſe of common recoveries was *ratio una*, but *non unica*; for a reverſion expectant is barred by a common recovery, and yet the recompence cannot extend to that; which he ſaid was a bold advance in favour of common recoveries (*b*). This rule was made abſolute.

(*a*) By ſtat. 14 *Geo.* 2. ch. 20. recoveries ſhall be good notwithſtanding the fine, or deeds making tenant to the writ, ſhould be levied or executed after the time of the judgment given in ſuch recovery and award of writ of ſeiſin, provided the ſame appear to be levied or executed before the end of the term, *&c.* in which ſuch recovery was ſuffered, and the perſons joining in ſuch recovery had a ſufficient eſtate and power to ſuffer the ſame. *Goodright ex dem. Burton* v. *Rigby*, 2 *H. Bl.* 46. 5 *T. R.* 177. A recovery was held good, although the tenant did not acquire the eſtate until after the day on which the writ of ſeiſin was returned to have been executed.

(*b*) Recoveries are now conſidered by the Courts as common aſſurances, which it is uſeleſs and abſurd to examine, according to any original principles. *Taylor ex dem. Atk* v. *Horde*, 1 *Bur.* 115. *Selwin* v. *Selwin*, 1 *Bl.* 254. *Martin* v. *Strachan*, 1 *Wilſ.* 75. *Doe ex dem. Crow* v. *Baldwere*, 5 *T. R.* 112.

6. Page *verſus* Hayward.

[Trin. 3 Ann. B. R.]

Piggot on Recoveries, 176, &c. S. C. more full than in any other book.

NICHOLAS SEARLE by his will deviſed to his niece *Mary Bryant* and the heirs male of her body, upon condition and provided that ſhe intermarry with and have iſſue male by one ſurnamed *Searle;* and in default of both conditions he deviſed to *Eliz. Bryant,* [in the ſame manner,] and in default thereof he deviſed to *George Searle* for ſixty years, if he ſo long live, remainder to the heirs male of the body of the ſaid *George*, and their iſſue male for ever. *Mary*, and *Elizabeth* with her huſband, (for ſhe had then married one *Cliff,*) joined in a fine to make a tenant to the *præcipe*, who was one *Iſaac Savery*. *Iſaac Savery* vouched *Mary Bryant*, *Eliz. Cliff* and her *huſband*, and the wife of the deviſor with her huſband, ſhe being again married, and vouched them all jointly, and they vouched over the common vouchee. *Et per Holt*, C. J. & *tot. Cur.* it was adjudged,

S. C. 3 Salk. 96, 135. Rep. A. Q. 61. Holt 618.

1 Saund. 180. 2 Lev. 21, 22. 1 Lev. 212. 1 Leon. 283. 1 Vent. 199 to 305. 10 Co. 41. 1 Mod. 86. 3 Mod. 20.

1ſt, That the eſtate deviſed to *Mary* was a good eſtate-tail, and ſo was the eſtate to *Elizabeth;* but it is a ſpecial intail; it is an eſtate to her and the heirs male of her body begotten by a *Searle*, which is a middle intail; not the higheſt nor the leaſt; for it might have been to her and the heirs of her body begotten by *J. Searle*, which had been more particular; yet this is a good eſtate-tail within the ſtatute *de donis*, for it is within the reaſon of the ſtatute.

To A. and the heirs of her body by one of the name of Searle is tail. Vide poſt 619, &c

2dly, The words, upon condition, &c. though they are expreſs words of condition, ſhall be taken to be a limitation; ſo it is held in 1 *Vent.* 199, 202. And *Holt*, C. J. ſaid, he ſaw no reaſon why they might not be ſo conſtrued in a deed, though the law had not been carried ſo far; and ſo the ſenſe is, if ſhe has no iſſue by a *Searle*, upon her death, the eſtate ſhall remain over.

Words ſtrictly conditional taken as limitation in a will. Vide 2 Co. 72, 73, 74, &c. Str. 1052. Doug. 63. 4 Bu. 1932. Fearn. C.R. Cruiſe 134. Vide 1 Bro. Ch. 55. Randal v. Payne.

3dly, That the eſtate-tail of *Mary* and *Elizabeth*, or either of them, does not ceaſe by marrying one that is not a *Searle;* for the remainder over is in default of both conditions, and in the mean time it is limited to her and the heirs male of her body, and ſhe may ſurvive the firſt huſband and marry a *Searle*, and ſo there is a poſſibility as long as ſhe lives.

4thly, If the eſtate had been to *Mary* and the heirs male of her body by a *Searle* to be begotten, provided and upon condition if ſhe do marry any but a *Searle*, that then it ſhall remain and be to *J. S.* and his heirs; a common recovery ſuffered before marriage will bar the eſtate-tail and remainders; and though ſhe after marry with another,

Condition that runs with the land cannot be barred by recovery, otherwiſe of condition collateral.

it ſhall not avoid the recovery: And the Court took a difference between a collateral condition and a condition that runs with the land. If the donor reſerve a rent with a condition to re-enter, a recovery will not bar it; otherwiſe if it be to re-enter for non-payment of a ſum in groſs. *Vide* 1 *Mod.* 103, 111. 2 *Lev.* 28, 60.

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Vi. 4 Bur. 1936.

And as to common recoveries (being of great uſe) the Chief Juſtice deſired to ſpeak largely.

Tenant in tail, and he in remainder may be vouched jointly. Noy 81, 82. 3 Co. Cupledike's Caſe, 1 And. 275. Vi. 2 Atk. 324. Cruiſe 114. 1 Inſt. 376. a.

1ſt, If tenant to the *præcipe* vouches tenant in tail in poſſeſſion, and him in remainder jointly, and they jointly vouch over the common vouchee, this is good; not but that it may be more regular, that the tenant vouch *Mary Bryant*, and ſhe *Elizabeth*, and ſhe over the common vouchee, that the recovery in value may not be joint, but enure ſeverally. Yet the other way is ſufficient; for where in an adverſary action a *præcipe* is brought againſt ſeveral, it is enough that one hath the tenancy of the land; and if he would plead that he is ſole tenant, and traverſe that the others have any thing, the defendant may admit that, and proceed as to him, and the writ ſhall only abate as to the reſt; alſo the others may diſclaim; and as a joining a ſtranger with a tenant does not hurt, ſo a joining a ſtranger with a vouchee does not; for he is but *in loco tenentis*, a tenant by the warranty. 20 *E.* 3. 10. 2 *E.* 3. 8. *Br. Several Tenancy*, 3, 4. 10 *H.* 6. 14. *Raſt.* 276.

If tenant vouches a ſtranger, who vouches tenant in tail, and he enters into warranty, it is good. 1 Vent. 358. 2 Co. 60, 61. Cro. El. 562.

2dly, If tenant in tail makes a tenant to the *præcipe*, and he vouches a ſtranger, and the ſtranger vouches a tenant in tail, and he the common vouchee, that is good; for his being a ſtranger is not material, becauſe in judgment of law he is become tenant by the voucher to the *præcipe*, and a releaſe to him is good, and the voucher is good, whether there be a real warranty or not. At common law, if a ſtranger was vouched, the demandant could not counterplead it; but by *Weſt.* 1. *c.* 40. he may, if he be abſent, counterplead the voucher, *viz.* that the voucher and his anceſtors never had any thing in the land; not if he be preſent. It is enough that tenant in tail comes in and owns a warranty, for there may be a warranty. Suppoſe an adverſary action againſt tenant in tail who has a warranty, and he makes a feoffment in fee with warranty, or has levied a fine with warranty, and the feoffee or conuſee vouch the tenant in tail, he may make uſe of his warranty, and yet he was not ſeiſed of the eſtate-tail; but in that caſe he may dereign the warranty, and then he recovers in recompence of his eſtate-tail; for whenever tenant in tail comes in as vouchee, he comes in in privity of all eſtates he ever had, and conſequently may dereign the warranty. *Vide* 1 *Inſt.* 385. *a.*

Tenant in tail coming in as vouchee comes in in privity of all eſtates he ever had. 3 Co. 60, 61. Plowd. 8. a.

And the Chief Juſtice ſaid, The vouchee's being a ſtranger was not material; becauſe, though there be no real warranty, the recovery in value is the ſame, and the admittance of tenant in tail has made it real.

Recuſants.

Vide 1 Lutw. 201, 208.

[*Vide* title *Church of England.*]

Domina Regina *verſus* Peach.

[Mich. 3 Ann. B. R.]

A Diſſenting miniſter having qualified himſelf according to the toleration act in one county, kept a conventicle in that county; and afterwards removed into another, and kept a new conventicle without a new qualification. The juſtices convicted him, notwithſtanding the toleration act. The attorney-general moved for an attachment againſt the juſtices, but it was denied; then he moved for a *mandamus* to permit him to preach, and that was denied alſo. The Court held, 1ſt, That a *mandamus* is always to do ſome act in execution of law, whereas this would be in nature of a writ *de non moleſtando*. 2dly, That a diſſenting miniſter is ſtill liable to the old penal laws for preaching in conventicles unleſs he qualify himſelf according to the act of toleration. 3dly, That a licence inrolled at the ſeſſions in one county, will not extend to another county; but he muſt have a licence inrolled in the county where he preaches. But *note*; The law is ſince altered in this particular, by the act for preſerving the Proteſtant religion, by better ſecuring the church of *England*. 10 *Anne*.

Licence to diſſenting miniſter inrolled in one county, does not extend to another. 6 Mod. 228, 310. S.C Poſt 673.

Noy 117. Lane 60. 1 Lutw. 208. 4 Leon. 54. 2 Cro. 142. 3 Lev. 62.

Releaſe and Defeazance.

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Vide Fareſt. 74, 75. 2 Saund. 48, 96. S. P. Poſt 575.

1. Aloff *verſus* Scrimſhaw.

[Trin. 1 W. & M. B. R.]

IN debt on a bond for 1000*l.* the defendant pleaded a covenant ſince made by the plaintiff, whereby he covenanted not to ſue for the ſaid debt upon the ſaid bond,

Covenant not to ſue for a certain time is not a releaſe or defea-

zance. Raym. 187, 393, 413. 3 C. 1 Show. 46, 47. Comb. 123. Carth. 63. Holt 619.

for and during the term of 99 years: This was held naught upon demurrer, for it is but a mere covenant, and doth not enure as a releaſe or defeazance, and ſo cannot be pleaded in bar. *Vide* 1 *Cro.* 352, 623. 1 *Ro.* 939. 21 *H.* 7. 24. (*a*)

(*a*) The ground of the deciſion in this caſe appears to be, that a perſonal action once ſuſpended by the act of the party is gone for ever; *ante* 302. *Dyer* 140.; therefore the covenant muſt be either an abſolute diſcharge, or a mere covenant; the former of which, being manifeſtly repugnant to the intent, ſhall not be implied. The ſame point was ruled in *Dowſe* v. *Jeffreys*, 1 *Rol.* 939. 11 *Vin.* 461. But it was held in that caſe, and alſo in this, according to the reports in *Show.* and *Comb.*, that a covenant not to ſue generally will operate as a releaſe. The ſame was ruled in *Searville* v. *Edwards*, cited 1 Ld. *Raym.* 420.

2. Clayton *verſus* Kynaſton.

[Hill. 10 Will. 3. B. R. Intr. Trin. 10 Will. 3. B. R. Rot. 246. 1 Ld. Raym. 419. S. C.]

One deed not to be conſtrued as a defeazance of another without neceſſity. Vide Cro. Car. 426. Cro. Jac. 309, 623. 1 Lev. 272. Poſt 575. S. C. 3 Salk. 298. Caſ. B. R. 221, 415, 548. Holt 178, 218.

CLAYTON, the executor of *Clayton*, the executor of *Winterſhall*, brought covenant againſt *Kynaſton* upon articles, and declared as on articles made between *Killigrew* and the ſaid *Kynaſton*, and others *ex una parte*, and *Winterſhall ex altera parte*; wherein it was covenanted, that if *Winterſhall* ſhould be minded to give over acting plays, and ſhould give notice in writing three months before he left off, that then three months after ſuch notice in writing, *Winterſhall* ſhould be allowed for every acting day 5*s. per* day, and that after the death of *Winterſhall*, 100*l.* ſhould be paid to his executors within three months; *provided ſuch notice* ſhould not be given but in an acting week; and for breach aſſigns that the 100*l.* was not paid within three months after *Winterſhall*'s death. The defendant pleaded that at the ſame time another deed was made between the ſaid *Winterſhall* of the one part, and the ſaid *Kynaſton* of the other part, wherein was contained the ſame agreement; and then it was farther covenanted by *Winterſhall* in the ſame deed, that in caſe he gave notice as aforeſaid, then the ſaid *Kynaſton* ſhould be diſcharged of all debts, and be indemnified and ſaved harmleſs from all agreements or ſecurities at any time before made, or hereafter to be entered into; then he avers notice was given, and that three months elapſed, *&c.* and ſo relies upon this as a defeazance. To this there was a demurrer.

[574] 1ſt, It was urged for the defendant, that this was a defeazance; for whatever the defendant loſt in this action would be recovered againſt him on his covenant, which was but circuity of action. *Vide* 1 *And.* 307. *Mo. pl.* 80.

2 *Saund.* 47, 48. One deed a defeazance to another made at the ſame time with it. *Vide* 1 *Inſt.* 265. Rebutter founded on the ſame reaſon.

The Court agreed, that if *A.* be bound to *B.*, and then *B.*, reciting this bond, covenants to ſave him harmleſs, this is an abſolute defeazance; and if it be to ſave him harmleſs on a contingency, it is a conditional defeazance, becauſe it hath an expreſs relation to the deed; but in the principal caſe there is not a relation between the deeds; but on the contrary, the plaintiff's deed is only to indemnify againſt all covenants heretofore made, or hereafter to be made. There is therefore no neceſſity to conſtrue the defendant's deed to be void and uſeleſs as ſoon as made, or that one deed has deſtroyed the other which was made at the ſame time with it, or that *Kynaſton* may play faſt and looſe at his pleaſure. Alſo the Court agreed, that where two are jointly and ſeverally bound in a bond, a releaſe to one diſcharges the other; and in ſuch caſe, if the joint remedy is gone, the ſeveral is gone too; and that in the caſe at bar, the joint remedy was loſt. But the Chief Juſtice, who delivered the opinion of the reſt, ſaid, they did not determine, that on covenant, where the joint remedy failed, there could not be a ſeveral remedy. Vide 1 T. R. 446. 3 Lev. 41. Com. 139. 2 Vent. 218.

2dly, It was objected to the declaration, that he declares of a deed made between *Kynaſton* of the one part, and *Winterſhall* of the other, and does not ſay *prædict. Winterſhall*, for want of which he does not appear to be the ſame perſon. This exception was not much heeded. Caſes cited *pro* and *con* were *Yelv.* 103. 3 *Cro.* 913. *Bridgm.* 99. *Dyer* 70. *Hard.* 178.

3dly, It was objected to the plea, that the notice is not ſaid to be given in an acting week; and though it was urged to be by way of proviſo, and therefore ought to come on the other ſide, (5 *Co.* 78. 3 *Cro.* 405. 7 *Co.* 10. *Poph.* 28. *Plo.* 376. 1 *Leon. pl.* 202.) and that the plea ſaid he had notice *ſecundum formam & effectum articulorum*; yet *Holt*, C. J. anſwered, that where the proviſo goes by way of defeazance, it muſt be pleaded by him that takes advantage of it; but this is not ſo, but alters the ſenſe of the covenant, by explaining and tying up the notice to a particular time, which would not have been underſtood on the general covenant, by which means it becomes a part of the covenant, ſo that you muſt plead accordingly; and, *ſecundum formam & effectum articulorum* is only matter of concluſion, which cannot ſerve without premiſes. And, upon this ſingle point (*a*), judgment was given for the plaintiff. Where a proviſo goes by way of defeazance of a covenant, it muſt be pleaded on the other ſide; otherwiſe where by way of explanation or reſtriction of the covenant. Vide 7 Co. 10.

(*a*) *Quære?* for by the report in Ld. *Raym.* and *come ſemble* by this report, the opinion of the Court was with the plaintiff on the firſt point; *et vide infra.*

3. Lacy *verſus* Kynaſton.

[Paſch. 13 Will. 3. B. R. 1 Ld. Raym. 688. S. C.]

Defeazance muſt contain proper words of defeazance. Vide 9 Co. 52. 3 Lev. 275. 1 Show. 151. 2 Lev. 214, 215, &c. Ante 573. S. C. 3 Salk. 298. Caſ. B. R. 221, 415, 548. Holt 178, 218. 1 Rol. 939. 1 Show. 46. 3 Cro. 623. Comb. 123. 3 Cro. 352.

THE plaintiff brought covenant as adminiſtrator to *Lacy*, and declared on the ſame indenture in the caſe before between *Kelligrew* and *Kynaſton*, and they *ex una parte*, and *Lacy ex altera parte*, reciting former articles, and they hereby covenant jointly and ſeverally with *Lacy*, that if he be minded to leave acting, and gives three months notice thereof to the company, he ſhall be paid 6*s.* 3*d. per* day for his life, and that within three months after his death his executors ſhall be paid 100*l.* And that if he die without ſuch notice, his executors ſhall be paid 100*l.* within ſix mohths after his death, in the nonpayment whereof the breach was aſſigned. The defendant craved *oyer*, and pleaded another deed made the ſame day and year, whereby *Lacy* and others covenant jointly and ſeverally with the defendant, that if he left off acting, and gave notice, he ſhould be freed and indemnified of and from the ſaid covenant, and avers he left off and gave notice, and became diſcharged, and ſo prayed judgment of the action. The plaintiff demurs, *&c.* And the queſtion was, Whether this was a covenant or a deſeazance? And the Court held,

3 Lev. 275. 1 Show. 46, 47, 151. 2 Lev. 214, 215, &c. Bond from A. and B. to H. joint and ſeveral covenant from H. not to ſue A., is not a deſeazance. S. C. ante 573.

1ſt, That this covenant in its nature was not a deſeazance, becauſe it wanted words of deſeazance, *viz.* that the thing be void.

2dly, If *A.* and *B.* are jointly and ſeverally bound to H., and *H.* covenants with *A.* that he will not ſue *A.*, this is not a deſeazance, for ſtill there is a remedy on the bond againſt *B.*; otherwiſe if *A.* only had been bound, for then ſuch covenant excludes him from any remedy for ever, to avoid circuity of action. *Vide* 43 *Aſſ. pl.* 44. This difference being applied to the principal caſe rules it, and it is but reaſonable; becauſe to conſtrue this to be or enure as a releaſe or deſeazance, is to diſcharge all; otherwiſe of a covenant. 34 *H.* 8. *Br. Eſtranger al fait.* 21 *Lit. ſect.* 376. *Inſt.* 232. *Hob.* 65.

Poſt 5-8. Com. Rel. E. 3.

4. Topham *verſus* Tollier.

[Trin. 1 Ann. B. R. 2 Ld. Raym. 786. S. C.]

Releaſe of all demands to the perſonal eſtate of the inteſtate, releaſes not a bond be-

DEBT *on a bond* againſt an adminiſtrator; the defendant pleaded a releaſe, whereby the plaintiff reciting there were ſeveral controverſies between the defendant and him about a legacy, and the right of adminiſtration, releaſes

releaſes to the defendant all his right, title, intereſt, and demand of, in, and to the perſonal eſtate of the inteſtate. Upon demurrer this was held no plea; for, *per Holt*, C. J. there is a difference between a releaſe of all demands to the perſon of the adminiſtrator, * as in *Yelv.* 214., and to the perſonal eſtate, as in this caſe; for the bond is not any right or demand to the perſonal eſtate till judgment and execution ſued out.

170, 222. Yelv. 156. 3 Lev. 274. Show. 150.

fore judgment and execution. 3 Leon. caſe 105, cont. Vide 10 Co. 48 to 52. Holt 621. S. C. Cro. El. 897. Lutw. 249, 250. 1 Lev. 99, 272. 2 Lev. 210. Poſt 578. 2 Cro. Carth. 119.

* [576]

Remainder.

Vide poſt Reverſion, page 590.

1. Corbet *verſus* Tichborn.

[Paſch. 6 W. & M. B. R.]

EJECTMENT, and trial at bar; the caſe was, *J. S.* was tenant for life, remainder to his wife for life, remainder to his firſt, ſecond, &c. ſons in tail, remainder to the right heirs of *J. S.* The ſaid *J. S.* commits treaſon, and then has a ſon, and then is attainted; and the Court held, that whether the ſon was born before or after the attainder, the contingent remainder to him was not diſcharged by the veſting in the Crown during the life of *J. S.*, becauſe of the wife's eſtate, which is ſufficient to ſupport it.

Attainder, vide poſt 630.

Vide Fearne's C. R. 426. (209.)

2. Thompſon *verſus* Leach.

Ante 427, 565. Vide poſt 618, &c. ib. 3 Lev. 284. 3 Mod. 296.

[Hill. 9 Will. 3. B. R. 1 Ld. Raym. 313. S. C. Comyns 45. S. C.]

A Deviſe was to *Simon Leach* for life, remainder to his firſt, ſecond, and third ſons, &c., remainder to Sir *Simon Leach* in tail, the remainder to the right heirs of *Simon Leach*: *Simon Leach* the tenant for life ſurrendered his eſtate by deed to Sir *Simon Leach*, and after that had a ſon born and died, and the ſon brought an ejectment againſt Sir *Simon*, and *Simon* his father was found to be *non compos* at the time of the ſurrender. *Et per Cur.* taking the ſurrender to be voidable only, it was held, that the plaintiff could have no title; for his eſtate in remainder

Surrender of tenant for life being non compos to a remainder man is void, and cannot bar contingent remainder. Right of entry will ſupport contingent remainder, right of action not. 1 Vent. 306.

1 Rol. Rep. 177. Eq. Ab. 178. p. 3. S. C. 3 D. 264. p. 13. 3 Salk. 300. 1 Show. 296. 3 Mod. 296, 301. 3 Lev. 284. 2 Vent. 198. Comb. 438, 468. Carth. 211, 250, 435. Holt 357, 623, 665. Cases B. R. 475. 1 Co. Arches's Case. 2 Saund. 382, 383. 1 Vent. 289. 3 Mod. 301. 2 Vent. 198 to 208. 1 Show. 296. 11 Co. 80 3 Keb. 177. 2 Jo. 2, 77. 3 Keb. 178, 244. F. C. R. 431.

der was a contingent remainder, and if the precedent eſtate was gone and determined by the ſurrender, the contingency could not ariſe. There muſt be a particular eſtate actually in being (*a*), or a preſent right of entry, [*vide Bigot* and *Smith*'s caſe, *Cro. Car.*] And it is not enough that there be * a right of action, but it muſt be a right of entry. And they held, that it was not for want of right to the thing, but of capacity to do the act, that a madman is hindered to avoid his own grant. 1 *Cro.* 102. 2 *Saund.* 387. 3 *Keb.* 2. And if this had been done in the life of the ſurrenderer by inquiſition, that would have preſerved the contingent remainder; but that cannot be done now, becauſe the particular eſtate is determined. To ſhew this, *Holt*, C. J. ſaid,

If there be tenant for life, with a contingent remainder to *H.*, and tenant for life is diſſeiſed, and after that a diſcent caſt, and five years expire, now the contingent remainder is gone, for there is nothing now to ſupport it, the right of entry being turned into a right of action: But before the diſcent the right of entry was ſufficient.

But they held the ſurrender in this caſe to be merely void, ſo that the particular eſtate remained in him, notwithſtanding the ſurrender, and the contingent remainder rightly veſted (*b*).

*[577]

That right of entry muſt be preſent.

If there be tenant for life with a contingent remainder, and he makes a feoffment in fee upon condition, and the contingency happens before the condition broken, the contingent remainder is deſtroyed; for there muſt be a particular eſtate, or a preſent right of entry when the contin-

(*a*) The following diſtinction is taken by Mr. *Fearne*, concerning the union of the particular eſtate with the next veſted remainder. If it is by immediate deſcent from the perſon by whoſe *will* the particular eſtate and contingent remainders are limited, the particular eſtate is not merged, or the contingent remainder deſtroyed; but, if the deſcent is mediate, it is otherwiſe.

The ſame diſtinction is taken between the caſes where a particular eſtate is limited with a contingent remainder over, and afterwards the inheritance is ſubjoined to the particular eſtate by the ſame conveyance, and thoſe caſes where the acceſſion of the inheritance is by a conveyance, accident, or circumſtance diſtinct from that conveyance which created the particular eſtate; page 503 (266) to 508 (271). A contingent remainder in a copyhold is deſtroyed by the expiration of the particular eſtate before the contingency happens; but not by the ſurrender or forfeiture of the particular tenant; *Gilb. Ten.* 249. *Fearne* 471. (245.); or a conveyance to him of the eſtate in remainder, 2 *Vern.* 243.

It ſeems that, in thoſe caſes where the legal eſtate is deviſed to and veſted in truſtees in truſt, there is no neceſſity for any preceding particular eſtate of freehold to ſupport contingent limitations; *Fearne* 449. (230.) *Temp. Talb.* 44, 145. 1 *Ves.* 268. 1 *Atk.* 581.

(*b*) On the authority of this caſe, *Lee*, Ch. Juſt. in *Yates* v. *Boen*, *Str.* 1104., permitted lunacy to be given in evidence on *non eſt factum*, and the plaintiff on the evidence became nonſuited.

gency

gency happens; but if tenant for life enters for breach before the contingency happens, the contingent remainder is revived (*a*), and may veſt (*b*).

(*a*) In *Bacon's Abridgment*, vol. 4. pa. 315., a different opinion is delivered; becauſe the feoffment, though upon condition, was a forfeiture and determination of the particular eſtate, and the recovery does not purge the forfeiture. But Mr. *Fearne* infers, from the authority of *Co. Lit.* 202. *b.* 1 *Rol. Abr.* 474. pl. 4. [5 *Vin. Abr.* 317.] where it is held, "that the eſtate is reduced, but the forfeiture not purged," that the opinion here expreſſed is agreeable to law.

(*b*) Judgment affirmed, *Sho. P. C.* 150.

3. Weeks *verſus* Peach.

[Mich. 13 Will. 3. B. R.]

H. Deviſed out of his lands a rent to one for life, with remainder over, *&c.* And *Shower* objected, that there could not be a remainder of a rent *de novo*; for there cannot be a remainder where there cannot be a reverſion. But, *per Holt*, C. J. there may be a remainder of a rent *de novo*; for the intent of the party gives it firſt a being for the whole, and then the leſſer eſtates are carved out of it. *Vide* 2 *Lutw.* 1225.

2 Keb. 89. Co. Lit. 298. a. Butl. note 2.

Remainder may be of a rent de novo. Vide ante 466. 1 Lev. 144. Q. Chan. Caſ. 79, 80. 1 Sid. 285. 6 Mod. 112. 1 Mod. 218. 2 Lev. 80, 88. Carter 52. 3 P. Wms. 230.

Rents.

[578]

1 Lev. 22, 25, 43, 144, 170. 2 Lev. 30, 80, 240. 3 Lev. 39, 150, 233, 295.

1. Stephens & Ux. *verſus* Snow.

[Hill. 2 W. & M. B. R.]

THE plaintiff declared upon a leaſe for years, *reddend.* 30*s.* at *Lady-day* and *Michaelmas*, and aſſigns for breach non-payment of a year's rent, due and ending at *Lady-day* 1689. The defendant pleaded a releaſe dated the 18th day of *November* 1688, of all demands; and, upon demurrer, judgment was given for the plaintiff; for the growing rent not due, which is incident to the reverſion, was not diſcharged; though the firſt half year's rent, which was a duty demandable, was releaſed; but here the releaſe

Growing rent not releaſed by releaſe of all demands. Vide ante 575. pl. 4. 10 Co. 48 to 52. 1 Lev. 99, 100. 2 Lev. 210. 1 Ven. 314. 1 Sid. 141. 2 Cro. 170. Lit. ſec. 510. 1 Mod. 95. 2 Cro. 486. Co. Lit. 292. b.

releaſe being pleaded as a bar to all, which it is not, the plea is naught, and judgment muſt be given for the plaintiff.

2. Lord Rockingham & al. *contra* Oxenden & al.

[*Coram* Trevor, *Maſter of the Rolls*, 1711.]

1 Will. Rep. 177. S. C. by the name verſus Penrice. Cro. Jac. 310. Cited and approved, 4 T. R. 173. Vi. ſtat. 12 G. 2. ch. 19.

THE leſſor dies upon *Michaelmas-day*, between three and four in the afternoon, before ſun-ſet, the rent being reſerved payable on *Michaelmas-day*. The queſtion was, Whether the executor or the heir, or, which is the ſame, the jointureſs of the leſſor ſhould have this rent? The executor inſiſted that this was the rent-day; that it might have been paid in the morning, and that a releaſe upon ſuch payment had been a diſcharge; and they denied the opinion of *Hale* in 1 *Saund.* 287., and ſaid, that ſo it was held by the judges of aſſize at *Durham*, *viz.* Baron *Bury*, *&c.* But on the other ſide it was argued and decreed, that the rent ſhould go to the heir or jointureſs, becauſe at the time of the death of the leſſor, there was no remedy nor means to compel the payment thereof. *Vide* 10 *Co. Clun's* caſe. 2 *Bulſt.* 293. *Plowd.* 172, 173. 1 *Inſt.* 202. 1 *Keb.* 59. 1 *Sid.* 162. 2 *Cro. Fox* verſus *Whichcot.*

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Vide Cro. El. 318, 883. 3 Co. 52. 1 Leon. 79. Lat. 248.

Repleader.

S. C. Ante 216, 273.

Staple *verſus* Hayden.

[Trin. 2 Ann. B. R. 2 Ld. Raym. 922. S. C.]

6 Mod. 1, 2, 3. 3 Salk. 121. Holt 217. Repleader not allowed before trial. 1 Lev. 32. 2 Lev. 12, 142, 164. If denied were grantable, error. 6 Mod. 2, 102. Parties begin de novo at the firſt fault. 1 Mod. 2.

IT was laid down by the Court in the caſe of *Staple* and *Haydon*, *Trin.* 2 *Ann. B. R.*, which ſee, title *Default*, *p.* 216., firſt, That at common law a repleader was allowed before trial, becauſe a verdict did not cure an immaterial iſſue: But now a repleader ought never to be allowed before trial, becauſe the fault of the iſſue may be helped by the trial by the ſtatute of jeofails.

2dly, That if a repleader be denied where it ſhould be granted, or granted where it ſhould be denied, it is error.

3dly, That the judgment of repleader is general, *viz.* *quod partes replacitent*; and the parties muſt begin again at the

the firſt fault, which occaſioned the immaterial iſſue: That if the declaration be ill, the bar ill, and the replication ill, the parties muſt begin *de novo*; but if the bar be good and the replication ill, at the replication. *Vide* 3 *Keb.* 664.

4thly, No coſts are allowed on either ſide (*a*). No coſts. Not after default. 6 Mod. 2, 3. 1 Keb. 23, 39, 89, 90. 3 Lev. 20, 440. Dyer 117, 118. 2 Saund 318, 319. 1 Salk. 173.

5thly, That a repleader cannot be awarded after a default.

See the form of a Repleader. Lutw. 1622.

(*a*) *Vide* 1 *Bur.* 292.

Replevin and Homine Replegiando. [580]

Vide 1 Lev. 90. Raym. 33, 34, 255, &c. 6 Mod. 68, 81, 103, 158, 189.

[*Vide* title *Avowry.*]

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1. Halet *verſus* Burt.

[Hill. 8 Will. 3. B. R. 1 Ld. Raym. 218. S. C. with other points.]

IN *treſpaſs* for taking, &c. The defendant juſtified that the place *where* was a hundred, and time out of mind had a court of all actions, replevins, &c., grantable in or out of court, and that a replevin was granted to him by the bailiff out of court, *virtute*, &c. It was queſtioned, Whether a hundred-court could preſcribe to hold plea of replevins, becauſe the county-court could not hold plea of them at common law, but were enabled by the ſtatute, which extends not to the hundred-court. But *per tot. Cur.* clearly, Suppoſing they may grant them in court, yet they cannot preſcribe to grant them out of court.

Bailiff of a hundred cannot grant replevins out of court. 5 Mod. 252. S. C. S. C. Carth. 380. 1 Inſt. 145. 2 Inſt. 139. Co. Ent. 284. Dyer 245. F. N. B. 73. Skin. 674. 3 Salk. 272. Caſes B. R. 120. Ante 394.

2. Richards *verſus* Cornforth.

[Mich. 9 Will. 3. B. R. 1 Ld. Raym. 255. S. C. Comyns 42. S. C.]

Avowry for rent, where part is not yet due, is error; but might be cured before judgment, by abating the avowry as to that. Vide Cro. Jac. 473. S. C. 5 Mod. 363. called Ricards verſus Cornforth. Moor 281. Hob. 133, 208. Comp. 781. 5 T. R. 248.

ERROR of a judgment in replevin, wherein the defendant avowed for rent and had judgment; and now Mr. *Carthew* aſſigned for error, that part of the rent became due after the diſtreſs taken, for the diſtreſs was made the 26th day of *September*, 7 *W.* 3., which was three days before *Michaelmas*; whereas the defendant had avowed for that *Michaelmas* rent. *Et per Cur.* This is naught, for the judgment is to have a return irrepleviſable, *i. e.* that he ſhall have the diſtreſs as a pledge till all the rent avowed for be paid, and that was more than was due at the time of the diſtreſs. In this caſe the avowant before judgment ſhould have abated his avowry *quoad* the *Michaelmas* rent, and taken judgment for the reſt; but the defendant getting his avowry mended in *C. B.*, the roll was amended here in *B. R.*, and ſo the error was cured.

[581]

3. Moor *verſus* Watts.

[Mich. 12 Will. 3. B. R. 1 Ld. Raym. 613. S. C. *Vide* Skin. 61.]

Homine replegiando. See 2 Show. 218, 221 to 232. 6 Mod. 84. Lit. Rep. 54. 3 Leon. Caſ. 323. Farreſt. 9. S. C. Caſes B. R. 423. Holt 626. Lilly Ent. 293.

UPON a *habeas corpus* it was returned, that *Watts* was in cuſtody by virtue of a *capias* in *withernam*; and the caſe was, That upon a *homine replegiando* the ſheriff returned an inquiſition, finding that the party was eloigned, whereupon a *withernam* iſſued, returnable *octab. Martini*, which was not yet come; but the defendant was taken thereupon and moved to be bailed, and the matter was four times moved and debated. It was objected, that he could not be bailed upon the *withernam*, for it was an execution, and he had no day in court, and the plaintiff could not have a new *withernam*: And the Lord *Grey* coming into court upon an *elongata* found, was committed and lay by a fortnight: Alſo they cited *Raymond* 474., and ſaid the return of the *elongata* was a kind of conviction, and the defendant thereby eſtopped from pleading *non cepit*. That which ſeemed to be the ſenſe of the Chief Juſtice, to which the reſt agreed, was,

The ſheriff cannot return they were not taken.

1ſt, That a *homine replegiando* does not differ from a common *replevin de averiis*; and that in a replevin for cattle, the ſheriff muſt either return a *deliberari feci*, or an excuſe thereof, *viz.* that no body came to ſhew him the cattle, or *elongata*; but he cannot return they were not taken,

taken, for that goes to the point of the writ which the defendant is to falſify, and not the ſheriff; that therefore the ſheriff muſt return an *elongata* where he cannot make a deliverance, and the defendant is not concluded by the return of the *elongata* to plead *non cepit*, becauſe it was neceſſary, and he could not avoid it: And as for this reaſon no action lies againſt the ſheriff for a falſe return of an *elongata*, where he cannot make deliverance; ſo the defendant is not concluded to plead *non cepit* to the action, becauſe he cannot falſify the return.

After elongata returned, and withernam awarded, the defendant may plead non cepit. See 2 Show. ut ſupra. Fareſl. 17.

2dly, That the *capias* in *withernam* does not alter the caſe, nor make it the ſtronger, becauſe it is the mere conſequence of the return of the *elongata*; therefore he is no more eſtopped by the *withernam* than he was by the *elongata* to plead *non cepit*, or to claim property if it were a common *replevin de averiis*.

3dly, That in *replevin de averiis* after an *elongata* and *withernam*, if the defendant pleads *non cepit*, he ſhall have his cattle again, and even a *capias* in *withernam* againſt the plaintiff for them; ſo it is if the defendant claims a property. Since the taking or property is in queſtion, the law deems it reaſonable that the defendant ſhould have his goods again during the diſpute. And by the ſame reaſon in a *homine replegiando*, * the defendant, upon pleading *non cepit*, ſhould be reſtored to his liberty; and the Court denied the *withernam* to be an execution, for that cannot be before judgment, and held it only to be a meſne proceſs: Alſo they diſliked the caſe in *Raymond*, and the caſe of the lord *Gray*, but affirmed the caſe in the *Reg.* 79. *a.* and thought it made for them, and that upon *non cepit* pleaded, he might be bailed. *Keil.* 71. *a. F. N. B.* 74. were cited. Adding this farther reaſon, that hereby the ſuppoſal of the writ is denied and balanced, and the matter ſtands indifferent, according to the rule of bailing laid down by my lord *Coke*, upon *Weſt.* 1. *c.* 15.

Upon pleading non cepit, or claiming property, the defendant ſhall have his goods again. So in homine replegiando he ſhall be bailed on non cepit.

* [582]

Withernam is meſne proceſs. Vide 2 Show. 218, &c. 6 Mod. 84. Fareſl. 17.

4thly, The Court held, that there might be a new *withernam*, but obſerved it was not neceſſary nor material to determine that in this caſe; for the bail muſt be in a ſum certain, with condition that he appear *de die in diem*; and if judgment againſt him, that he render his body in *withernam ibidem remanſurus quouſq;* he render the party, and permit him to go at large; therefore if he be rendered again, he is in cuſtody upon the *withernam*, as before. So if *H.* brings an *audita querela*, and is bailed, and judgment is againſt him, when *H.* is rendered back, he is in cuſtody again upon the firſt execution; and ſo in an appeal of murder, if the defendant be bailed and makes default, proceſs ſhall go againſt the bail, and alſo a *capias* againſt him; but if he render, he is in cuſtody upon the appeal.

There may be a new withernam after the defendant has been bailed upon the firſt.

appeal. Yet *note*; Upon his default a new *capias* lies againſt him. So in this caſe, if before the *withernam* the defendant had pleaded *non cepit*, that had ſtopped the *withernam*; but if that had been found againſt him, the impediment was removed, and a *withernam* ſhould have gone; ſo here, if after the *withernam* he plead *non cepit*, which is found againſt him, and he is not rendered, a *capias* in *withernam* lies againſt him, as well as proceſs againſt his bail; for there is nothing to hinder it. *Vide* 8 *H.* 4. 2. *T. Mainprize* 23.

If on elongata returned the defendant pleads non cepit, no withernam ſhall iſſue. Vide 6 Mod. 84. Lit. Rep. 54. 3 Leon. Caſ. 323.

The plaintiff's counſel ſeeing that by the opinion of the Court the defendant could not be bailed, unleſs he pleaded *non cepit*, would not deliver a declaration; which the Court ſaid was putting a difficulty upon them; and upon this, in order to nonſuit the plaintiff, the queſtion was, Whether the plaintiff was demandable upon the *withernam*? Alſo there was a former queſtion, Whether he might be bailed upon the *habeas corpus* before the return of the *withernam*?

In homine replegiando, defendant cannot be bailed before the return of the withernam. See 2 Show. 228 to 232.

As to the laſt point the Court held, that before the return of the *withernam* the defendant could not be bailed; and ſo it is of an appeal of murder, the defendant ought not to be bailed before the return of the writ; and though this has been done in an appeal by ſome judges, yet *per Holt*, C. J. It was done *minus rite*; he would not therefore allow bail before the return of the *withernam*, and ſaid, that in a *homine replegiando* after an *elongata* returned, if the defendant comes in *gratis*, and pleads *non cepit*, he ſhall not be put to final bail; (*ratio videtur eſſe*, becauſe hereby the *withernam* is eſtopped or ſuſpended;) but if he comes in cuſtody upon a *capias* in *withernam*, he muſt give bail, and cannot be admitted to that till he call for a declaration, and plead *non cepit*.

[583]

Plaintiff is demandable on the return of the withernam, and may be nonſuited for not appearing.

As to the other point, the Chief Juſtice ſaid, that whenever a writ is awarded, which is returnable, the return day is a day to both parties to appear, and though the writ be returned not ſerved, the defendant may appear to prevent any ill conſequence: As to prevent a *capias*, 5 *E.* 4. 69. So here to ſave himſelf on a *withernam*. *Reſpond.* 57. 7 *E.* 4. 5. Upon a *diſtringas proximas villas*, &c. the defendants have no day, yet they may appear and traverſe. In a common replevin the original gives no day, for that is *vicontiel*; ſo is the *alias*, but the *pluries* is returnable here; and though there is no ſummons nor attachment in the writ, yet the day of the return is a day to the parties, and the entry is, that the defendant *attachiatus eſt ad reſpondend. de pl'ito quare cepit*, &c. And the reaſon is, becauſe though in truth there was not actually an attachment, yet virtually and in conſequence of law it is ſo, he being bound to appear upon the peril of a *wither-*

nam.

nam. And though the plaintiff be abſent, he may make an attorney. Hereupon he was called and nonſuited, for otherwiſe the defendant might loſe his liberty for ever by ſuch a contrivance.

4. Horn *verſus* Lewin.

[Hill. 12 Will. 3. B. R. 1 Ld. Raym. 639. S. C. Forteſcue 233. S. C.]

IN *replevin* the defendant made conuſance for 100 *l. de redditu onerat. in aretro pro uno anno.* The plaintiff as to 50 *l.* pleads *de injuria ſua propria abſque hoc quod fuit in aretro*, and as to the other 50 *l.* that he was ready on the land till ſun-ſet, and none came to receive it, and that he is ſtill ready to pay it, and brings the money into court. Defendant demurs ſpecially to the firſt plea, *quia attingit ad generalem exitum.* And as to the other 50 *l.* he takes it out of court, *& pro dampnis dicit quod non obtulit, &c.* and upon this the plaintiff demurred.

In a plea in bar of tender of rent in replevin, the money ought not to be brought into court. S. C. 3 Salk. 273, 344, 356. Caſes B. R. 352. Vide poſt 596, 597. Raym. 419. 1 Inſt. 34. 1 Vent. 222. De injuria ſua abſq. hoc quod fuit in aretro; amounts to the general iſſue.

The caſe being ſeveral times ſpoken to, it was held,

1ſt, That *de injuria ſua propria abſq; hoc, &c.* was an impertinent round-about way of pleading the general iſſue, and that it amounted to no more than the general iſſue, *riens in arrere*, and conſequently was ill upon a ſpecial demurrer: Alſo this traverſe put the defendant to an unneceſſary replication; therefore as to the 50 *l.* it was clear for the defendant.

[584]

2dly, As to the other 50 *l.* the Court held, 1ſt, That the bare *paratus* was not ſufficient, and did not amount to a tender without an *obtulit*, and therefore his being ready on the land, ſince he did not tender the rent, did not oblige the grantee to demand the rent before he made diſtreſs. *Hob.* 207. 1 *Ven.* 322. And ſo the diſtreſs was lawful without a demand, and then the avowry or conuſance of the defendant ſtands unanſwered. 2dly, The *profert* of the money was impertinent and idle. *Keil.* 20. *Dy.* 227. 2 *E.* 4. 25. *Pl.* 15. 2 *Cro.* 126. In debt upon a bond, there might be a *profert*, to ſave damages; becauſe there the money is the thing in demand. But it cannot be in an avowry to a replevin, becauſe the avowry is to juſtify the taking the cattle; and whether the money is paid or not, is not the queſtion; but if the diſtreſs was rightfully taken, the avowant muſt have a return; if wrongfully, he muſt anſwer the plaintiff's damages. If then the *profert* was ſuperfluous, ſo was the avowant's accepting it, and judgment muſt be given for the avowant on the avowry, by which it appears that rent was behind, and the diſtreſs lawful, and to which there is no ſufficient anſwer.

Vide 3 Lev. 104, 105. Raym. 419.

Vide H. Bl. 24.

5. Pratt *verſus* Rutlith.

[Trin. 13 Will. 3. B. R. *Vide* this caſe, title *Avowry*, pl. 6, page 95.]

OF *property claimed in replevin*, 6 *Mod.* 69, 81, 139, 140. 1 *Lev.* 90. *Lutw.* 1316.

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Vide 1 Lev. 68, 85, 289. 2 Lev. 198. 3 Lev. 363, 366. S.C. 6 Mod. 277, 259. 3 Salk. 369. Hob 68.

Requeſt.

Fitz-Hugh *verſus* Dennington.

[Mich. 3 Ann. B. R. 2 Ld. Raym. 1094. S. C.]

Condition to do an act at the end of ſeven years upon requeſt; requeſt muſt be made on the laſt day. See 1 Lev. 68, 85. Pal. 321. Fareſt. 143, 144. Aleyn 25. Sty. 49, 74. Yelv. 66. 1 Cro. 179, 280. 2 Cro. 183, 652. 6 Mod. 200, 227, 260. 1 Saund. 35. 1 Rol. Rep. 374. Moor 241. 1 Leon. 68, 69.

DEBT on a bond, with condition, reciting, that the plaintiff was apprentice to the defendant for ſeven years; *and that if the defendant at the end of ſeven years ſhould procure him to be made free of the joiners' company (if requeſted) then the bond to be void.* The defendant pleaded, that at the end of ſeven years or afterwards *hucuſq;* he was not requeſted. The Court held a requeſt neceſſary, for the condition was to do a collateral thing; and as it is part of the condition it muſt be averred. And here a requeſt within the ſeven years, when the thing was not to be done, ſhall not be intended *per Cur.* Afterwards this was moved again by *Broderick*, who urged, that the defendant ſhould have pleaded he was not requeſted generally, and that the requeſt might have been before the end of the ſeven years. *Et per Cur.* It is not to be done *poſt finem*, but *ad finem*, and the end of a thing is always part of that of which it is the end, and he was to be made free the laſt day of the ſeven years, and ſhould have requeſted ſome convenient time in that day, that the other might have a reaſonable time to do it in. Adjudged on a writ of error of a judgment in the Marſhal's Court for the plaintiff, and the judgment reverſed, *per totam Curiam.*

Reſcue.

See Cro. Car. 109. Cro. Jac. 345, 486. 2 Hawk. P. C. 139, &c.

1. Dominus Rex *verſus* Belt.

[Mich. 8 Will. 3. B. R.]

IN the caſe of a reſcue there are two ways of proceeding: If the reſcous is returned to the philazer, and proceſs of outlawry iſſues, and the reſcuer is brought into court, he ſhall not be diſcharged upon affidavits; but where upon the return of a reſcue an attachment is granted, and the party examined upon interrogatories, upon anſwering them he ſhall be diſcharged.

Where the reſcue ſhall be diſcharged upon affidavits. Vide pl. 3. infra.

2. Anonymous.

[Trin. 12 Will. 3. B. R. 1 Ld. Raym. 589. S. C.]

See Ray. 161. 1 Lev. 214. 2 Lev. 26, 28. 3 Lev. 46.

THE ſheriff returned *virtute brevis mihi direct. feci warrant. A. & B. ballivis meis qui virtute inde ceperunt* the defendant *& in cuſtodia mea habuerunt quousq;* ſuch and ſuch *reſcuſſerunt* him *ex cuſtodia ballivorum meorum:* And Mr. *Eyre* moved to quaſh it, and it was quaſhed *per Cur.* For *per Holt*, C. J. When the bailiffs have arreſted the party, he is in fact and in truth in their cuſtody; but in law, he is in the cuſtody of the ſheriff. An anſwer either way is good, *viz.* that he was reſcued out of the bailiff's cuſtody, or that he was reſcued out of the ſheriff's cuſtody; but to ſay he was in the cuſtody of the ſheriff, and yet reſcued out of the cuſtody of the bailiffs, is repugnant.

Return that the bailiffs had him in cuſtody of the ſheriff, and H. reſcued him out of the cuſtody of the bailiffs, ill for repugnancy. Vide ante 436, 432. Poſt 589. 1 Show. 180. Lutw. 130. 6 Mod. 211. 3 Mod. 114, 115.

3. Anonymous.

[Hill. 3 Ann. B. R.]

UPON an affidavit of a reſcue, an attachment was prayed againſt the reſcuers, and this was a reſcue upon meſne proceſs; but denied; for *per Holt*, C. J. The reſcue muſt be returned upon the writ, and the motion and attachment founded upon that; but it is never the courſe to grant it upon affidavits.

Attachment for a reſcue never granted upon affidavits. Vide Str. 531. Fine for a reſcue.

Sir *Samuel Aſtry* ſaid, it was the conſtant courſe upon the return of a reſcue, to ſet four nobles fine upon each

Vide Raym. 85. 3 Lev. 312.

offender, and that he had it from Mr. J. *Twiſden*. *Hill.* 11 *Will.* 3. *B. R.* *Vide* 2 *Jo.* 198. (*a*)

See 6 Mod. 141. *a difference where it is on meſne proceſs, and where on an execution.*

(*a*) In *Rex* v. *Elkins*, 4 *Bur.* 2189., Lord *Mansfield* ſaid, that this ſeemed to be a ſtrange rule; it puts all reſcues, in all caſes, and under all circumſtances, upon the ſame foot. The Court in that caſe fined the defendant 5 *l.* In *Rex* v. *Alway et al.*, marg. *ibid.* the Court ſet a fine of only 6 *s.* 8 *d.* each.

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[587] # Reſtitution.

1. Rex & Regina *verſus* Leaver.

[Trin. 3 W. & M. B. R.]

Writ of reſtitution lies not againſt any that are not parties to the record. Raym. 85. S. C. 2 Lev. 223. 3 Keb. 231. 1 Show. 261. Comb. 47, 58. Skin. 32. Tem. 320.

IN an indictment of barretry, the defendant was convict and fined 100 *l.* which was levied by the ſheriff, and paid into the hands of the collectors; afterwards the judgment was reverſed. *Pemberton* moved for a rule for reſtitution againſt the collectors. *Holt*, C. J. It cannot be, for they are not party to any record here. You ought to ſue out a ſpecial *ſci. fa.* and make them parties, as in 1 *Cro.* 328., but this he alſo doubted, ſaying, this caſe differed. He put this caſe: A recoverer in ejectment is diſſeiſed, or makes a feoffment; afterwards the judgment is reverſed: Will a writ of reſtitution lie? He ſaid it would not, becauſe the diſſeiſor or feoffee are ſtrangers to the record, which *Pemberton* agreed. If a feme recover damages and then marries, and the judgment is reverſed, reſtitution lies againſt her and her huſband; but they are parties. And the motion was denied.

Vide 5 Mod. 443, 444.

2. Dominus Rex *verſus* Toſlin & al.

[Hill. 10 Will. 3. B. R.]

Reſtitution denied upon quaſhing inquiſition of forcible entry, leaſe for years ſtanding out.

A Motion was made for reſtitution, upon quaſhing an inquiſition of forcible entry; the caſe was, that the leſſor arreſted the leſſee for rent, and while he was in cuſtody entered the houſe under pretence of forfeiture by a proviſo in the leaſe; but the motion was denied, becauſe

cauſe here appears a title ſtanding out; which he ſhall not void by ſiniſter means, but ought to purſue his remedy by ejectment according to law. Otherwiſe, had no title appeared.

Cro. El. 466. 1 Leon. Caſ. 461. Vide Dalton, c. 132 1 Hawk. c. 64. ſ. 47.

3. Domina Regina *verſus* Winter.

[Paſch. 4 Ann. B. R.]

UPON a motion made by Mr. *Broderick* for a *procedendo* in a caſe of an inquiſition taken by juſtices of peace, and a forcible detainer found, and a warrant granted by them to reſtore the poſſeſſion, which was ſuſpended by a *certiorari* * iſſued out of this court, it was ſaid by *Holt*, C. J. That if the party againſt whom the inquiſition was found could traverſe the force, that was always a reaſon to ſtay reſtitution; nay, that it had been held a *ſuperſedeas* to the awarding reſtitution, and that it was ſo in Sir *Richard Bray*'s caſe: There an inquiſition found a forcible entry: The defendant offered immediately before the juſtice to traverſe the force, the juſtice refuſed the traverſe and granted reſtitution; and *Kelynge*, C. J. granted re-reſtitution. He ſaid alſo, that all inquiſitions of office are of common right traverſable; ſo is a *diſtringas proximas villatas*, in caſe of pulling down hedges in the night, on the ſtatute of *Weſt.* 2. though the ſtatute mentions no ſuch thing. And if in caſe of an inquiſition of forcible entry taken before a juſtice of peace, the defendant tenders his traverſe immediately, the juſtice muſt adjourn to another day, and award proceſs to return a jury. *Powel*, J. ſaid, that in the caſe in *Dyer* 122. a traverſe of the indictment was held to be a *ſuperſedeas* only at election, but latterly it had been held an abſolute *ſuperſedeas*: And he ſaid alſo, that if *H.* licenſe another to enter into his land and take the profits, it is a leaſe at will; and if the licence was for a year, it is a leaſe for a year; otherwiſe of a licence to hunt. And if *H.* licenſe another to come upon his dock (which was the principal caſe), and carry on his trade, it is a leaſe; becauſe it is all the proper profits of a dock. Note; *Trin.* 11 *W.* 3. *Rex* verſus *Scarlet*, the ſame queſtion was, *viz.* Whether re-reſtitution ſhould be granted, becauſe the juſtice had refuſed a traverſe to an inquiſition of forcible entry? But not reſolved. 1 *Sid.* 287. 2 *Keb.* 571. *Dy.* 122. *Sty.* 359, 360. were cited.

Traverſe to inquiſition of forcible entry is a ſuperſedeas to reſtitution. S. C. Holt 324. Vide 1 Hawk. c. 64. ſ. 60, 62.

*[588]

Rep. Temp. Hard. 175. Str. 474.

Vide Cro. Jac. 246, 698. Cro. Car. 328.

4. Anonymous.

[Paſch. 4 Ann. B. R.]

Where the money recovered in a judgment appears by record to be paid, reſtitution ſhall be without a ſcire facias; otherwiſe where levied only.

WHERE the plaintiff has execution, and the money is levied and paid, and that judgment is afterwards reverſed, there, becauſe it appears on the record that the money is paid, the party ſhall have reſtitution without a *ſcire facias*, and there is a certainty of what was loſt; otherwiſe where it was levied but not paid; there muſt then be a *ſcire facias*, ſuggeſting the matter of fact, *viz.* the ſum levied, *&c.* But where judgment is ſet aſide after execution for irregularity, there needs no *ſcire facias* for reſtitution, but an attachment ſhall be granted upon the rule for contempt, if there be not a reſtitution. *Per Holt*, C. J.

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Vide 4 Leon. Caſ. 69, 145, 223. Cro. El. 310. Cro. Car. 289. Poſt 699.

Retorn of Writs.

[*Vide* title *Writs.*]

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1. Wilſon *verſus* Law.

[Mich. 6 W. & M. B. R. 1 Ld. Raym. 20. S. C.]

Attach. feci good in a return. Vide Cro. El. 13. pl. 7. 4 Mod. 287. 2 Roll. 459.

WILSON brought an appeal of murder againſt *John Law* for killing his brother *Robert Wilſon*, and declared againſt him. The defendant prayed *oyer* of the writ and return; and having *oyer*, demurred to the writ and return, and to the felony pleaded over, not guilty. Exception was taken, 1ſt, That the writ commanded the ſheriff *quod attach. Johannem Law, &c.*, and the ſheriff had returned *attachiari feci.* This they pretended was no anſwer to the writ, the injunction whereof is perſonal; but the Court held it well enough, for the ſheriff was not bound to execute it in perſon, but might do it by his bailiffs. *Dyer* 241. 2 *Ro.* 457. And what the bailiffs do by the ſheriff's warrant, is done by the ſheriff, *nam qui facit per alium, facit per ſe.* If he had returned *attachiatus eſt*, it had been good. *Captus eſt* is a good return to a *capias*, *Kitch.* 258.; for if there is the ſubſtance, it is no matter for form, as 1 *H.* 6. 6. a *ſcire facias* was returned, *ſcire faci A. B.*, without adding *infra nominat.*; yet, be-

cauſe it was ſaid to be *virtute brevis prædict. prout mihi præciptur*, it was adjudged good.

2dly, The ſheriff returned, *ita quod corpus ejus paratum habeo ubicunq;* and it was objected this was nonſenſe, and alſo impoſſible. *Sed per Cur.* The return is good without it; it is therefore but ſurpluſage, which will not vitiate a writ or indictment, much leſs a return, which requires not ſuch preciſeneſs in form. 3 *Cro.* 893. 2 *Ro.* 460.

Surpluſage in return rejected. Vide ante 430, 432, 436, 586.

See more of this caſe, title *Appeal*, *pl.* 2. *pag.* 59

2. Palmet *verſus* Price.

[Mich. 7 Will. 3. B. R.]

AN action was laid in *Staffordſhire*, and judgment for the plaintiff; he ſued out a *fieri facias* with a *teſtatum* into *Worceſterſhire*; and now it was moved that this was irregular, and ought to be ſet aſide, becauſe no *fieri facias* had ever gone into * *Staffordſhire*; and the ſheriff of *Staffordſhire* made affidavit that he never returned any *fieri facias* in the cauſe: *Sed non allocatur*; for the *fieri facias* upon which the *teſtatum* is founded, is returned of courſe by the attornies themſelves, as originals are; if you ſearch the file you may find one, and that is ſufficient.

Proceſs whereon to ground teſtatum is returned by the attorney of courſe. Ante 515. 1 Barnes 138. 2 Barn. 163.

* [590]

3 T. R. 658.

Reverſion.

Vide ante Remainder, page 576. 1 Saund. 260, 261. 1 Salk. 231. 3 Lev. 94, 209, 233, 406.

Abbot *verſus* Burton.

[Trin. 7 Ann. C. B. Comyns 160. S. C.]

J. S. being ſeiſed in fee of certain lands deſcended to him *a parte materna*, covenants to levy a fine thereof to *A.* and *B.* to the uſe of them and their heirs, to the intent that a common recovery ſhould be ſuffered againſt the ſaid conuſees to the uſe of *J. S.* for life, remainder to his wife for life, remainder to his firſt, ſecond, and third ſons in tail, *&c.*, remainder to the right heirs of *J. S.* The fine is accordingly levied, and then the common recovery is ſuffered againſt the conuſees of the fine, as tenants to the *præcipe* with voucher of *J. S.* Afterwards *J. S.* and his wife die without iſſue, and the leſſor of the plaintiff is

H. ſeiſed of lands a parte materna, limits ſeveral eſtates with remainder to the uſe of his right heirs. The heir a parte materna ſhall have it, being the ancient uſe. 2 Mod. 286. 1 Co. 105. Cro. Car. 161. 2 Lev. 60, 79. Cro. Eliz. 727.

840, 772. S. C. Rep. A. Q. 181. Show. 92. 1 Inſt. 73.

is heir of *J. S. a parte materna*, and the defendant heir-general. This matter being found upon a ſpecial verdict in ejectment, the queſtion was, Whether this limitation of the remainder to the uſe of the right heirs of *J. S.* did create a new eſtate deſcendible to the heirs-general, or was only the ancient uſe? And the reſolution of the Court delivered by *Trevor*, C. J. was for the plaintiff, that it was the ancient uſe, and that there was no difference when upon the conveyance of an eſtate any part of the uſe reſults by implication of law, and when it is referred by expreſs declaration to the party from whom the eſtate moved; for there is no reaſon that a greater alteration ſhould be wrought in a uſe which a man by expreſs and plain words reſerves to himſelf upon a conveyance of his eſtate, than when the law makes a conſtruction of this intent to reſerve it, not from expreſs words, but from other circumſtances and preſumptions, which in the conſideration of law do as ſtrongly and manifeſtly declare his mind: And for this was cited the caſe of *Godbolt* and *Freeſtone*, 3 *Lev.* 406.

No difference between expreſs and implied uſe. Poſt 675, 676.

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But the difference whereby that caſe was endeavoured to be diſtinguiſhed from the caſe in queſtion was this: That was upon a feoffment to the uſe of the feoffor for life, remainder to his firſt, ſecond, and other ſons in tail, remainder to the right heirs of the feoffor; and adjudged, that this remainder was to the heirs of the feoffor *a parte materna*, according to the ancient eſtate and uſe which the feoffor had before the feoffment: And the reaſon was, becauſe this remainder of the uſe did ariſe out of the eſtates which immediately moved from the feoffor, and was no more than what the law would have reſerved, if no uſe at all had been declared of the remainder. But in the preſent caſe, the uſe limited in remainder to the right heirs of *J. S.* does not ariſe out of an eſtate that moved immediately by that conveyance from *J. S.*, but out of the eſtate of the conuſees, who were ſeiſed in fee both of the eſtate and uſe by the fine, and did by the common recovery convey over that eſtate, out of which all the new uſes and the remainder in queſtion aroſe. To this the Chief Juſtice ſaid, that the fine and common recovery were both to be taken as one entire conveyance (*a*), conſiſting of theſe ſeveral parts, and directed as to the uſe of them by the ſame covenants. That though the conuſees had a ſeiſin in fee of the eſtate and uſe veſted in them by the fine for a ſpecial purpoſe, and upon that ſeiſin the common recovery was had, and in ſtrictneſs the eſtate paſſed by it was her eſtate; yet upon conſideration of the whole conveyance the eſtate did originally move from *J. S.* who was the co-

Vide ante 567, 570.

(*a*) *Vide Cro. Jac.* 643. 2 *Burr.* 1134. 4 *Burr.* 1952.

nuſor

nuſor of the fine; and for that reaſon, if there had been no limitation at all of this remainder of the uſe upon this recovery, he took it to be very clear, that ſo much as remained unlimited ſhould reſult to the conuſor and his heirs, and not to the conuſee, in whom the eſtate was not veſted with a purpoſe to create him any intereſt, but in order to forward and complete the conveyance of the conuſor's eſtate, which was taken as one conveyance; then does the uſe limited upon the common recovery as properly ariſe out of the eſtate that moved from the conuſor of the fine, as if he had made a feoffment or fine, or any ſingle conveyance to that uſe. Judgment for the plaintiff (*a*).

Note; Eſtates-tail cannot be barred where the reverſion is in the Crown. Raym. 358.

(*a*) *Vide Doe ex dem. Crow* v. *Baldwere*, 5 *T. R.* 104. Note to *Price* v. *Langford*, *ante* 337.

Revocation.

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See 1 Lev. 86. 2 Lev. 149. Cro. Jac. 497. 3 Lev. 213. 3 Show. 89.

1. Hitchins *verſus* Baſſet.

[Trin. 5 W. & M. B. R.]

IN *ejectment*, the jury found a ſpecial verdict: That Sir *H. Killigrew* being ſeiſed in fee, made his will, and deviſed his lands to *B.* for life, remainder to *C.* in fee; they find likewiſe that Sir *H. Killigrew* made *aliud teſtamentum* in writing; but what were the contents of that will they do not know: The queſtion was, if the firſt will was revoked? *Finch* argued, that every later will is not a revocation, for a man by one will may diſpoſe of one acre, and by another will of another acre: So if a man purchaſe lands after he has made his will, he need not make his will over again, but make another will as to theſe. *Vide Cro. Car.* 293. Therefore this other will might be of other lands, and no revocation, and the *aliud teſtamentum* might be no revocation, but might be conſiſtent. *Cro. Eliz.* 721. *Cro. Car.* 24. *Levinz contra* argued, that revocations are favoured, becauſe they are in the nature of reſtitution to the heir, and all reſtitutions are favoured. *Vide Dyer* 310. *Moor* 429. 1 *Roll* 614. A deed of feoffment without livery, a bargain and ſale without inrolment,

Special verdict finding a will of lands, and that afterwards the teſtator made aliud teſtament. imports not a revocation. 1 Co. 112, and 174. 10 Co. 86. 2 Lev. 149. S. C. 2 D. 528. p. 7. 3 Mod. 203. 1 Show. 537. Comb. 90, 209

a grant of a reverſion without attornment will revoke a will, and yet theſe are void acts; but the reaſon is, that it appears now it was not the teſtator's intent that it ſhould remain his will, the firſt will muſt be ſuppoſed to be perfect and include all; and if a man claims by deviſe, he muſt in pleading ſay, that the teſtator by his laſt will deviſed, &c. 44 *Aſſ.* 36. 2 *Ric.* 2. 3. *b.* But the Court were of opinion, that it was no revocation, and the *aliud teſtamentum* might concern other lands, or no lands at all, or be a confirmation of the former: And the judgment was afterwards affirmed in the Houſe of Lords. *Vide Hard.* 374. *Parl. Caſes* 146. (*a*)

(*a*) In the caſe of *Goodright ex dem. Rolfe* v. *Harwood*, 3 *Wilſ.* 497. *it was found* by ſpecial verdict, that the teſtator made and duly publiſhed *another* will, the diſpoſition whereof was *different* from the diſpoſition in the former, but in what particulars was unknown. The Court of *C. B.* held, that the firſt will was revoked; but the judgment was reverſed in *B. R. Cowp.* 86., and the judgment of reverſal affirmed in the Houſe of Lords, 7 *Bro. P. C.* 344. Mr. *Powell* obſerves, that if the jury find *expreſsly*, that the diſpoſition made by the ſecond will is *inconſiſtent* with the deviſes contained in the former, that appears to be a ſufficient ground to decide the latter a revocation, *Eſſay on Deviſes*, 541. Wherever there is an alteration in the legal or equitable eſtate of the deviſor, a will is revoked, *Burgoigne* v. *Fox*, 1 *Atk.* 576. *Bennett* v. *Wade*, 2 *Atk.* 325. *Darley* v. *Darley*, 3 *Wilſ.* 6. 7 *Bro. P. C.* 177. Ld. *Lincoln's* Caſe, *Sho. P. C.* 154. *Eq. Ab.* 411. 2 *Freem.* 202. *Pollen* v. *Huband*, *Eq. Ab.* 412. *Sparrow* v. *Hardcaſtle*, 3 *Atk.* 799 *Amb.* 224 *Diſter* v. *Diſter*, 3 *Lev.* 108. *Marwood* v. *Turner*, 3 *Wms.* 163. *Lutwich* v. *Mytton*, 1 *Rol. Ab.* 614. *Hick* v. *Mors*, *Amb.* 215. *Vide Parſons* v. *Freeman*, 3 *Atk.* 741. *Rider* v. *Wager*, 2 *P. Wms.* 329. *Cotter* v. *Layer*, *id.* 624. Where a will is made between the making tenant to a *præcipe* and ſuffering a recovery thereon, or between the ſurrender and admittance to a copyhold, it is good, as the ſubſequent acts relate to the prior, *Selwyn* v. *Selwyn*, 2 *Bur.* 1131. 1 *Bl. Rep.* 251. *Roe ex dem. Roden* v. *Griffiths*, 4 *Bur.* 1952. 1 *Bl.* 605. A conveyance of the legal eſtate from one truſtee, &c. to another, is not a revocation, *Doe ex dem. Gibbons* v. *Potts*, *Doug.* 710. Nor in equity, a conveyance of the legal eſtate to the deviſor having a prior equitable intereſt, *Watts* v. *Fullarton*, cited *ibid.* *Willett* v. *Sandford*, 1 *Ves.* 178, 186. A mortgage in equity is only held a revocation *pro tanto*, *Rider* v. *Wager*, 2 *Wms.* 616. *Vide Powell* 566. for other caſes relative to this ſubject. In *Swift ex dem. Neale* v. *Roberts*, 3 *Bur.* 1491. Lord *Mansfield* ſaid, conſtructive revocations, contrary to the intention of the teſtator, ought not to be indulged, and ſome overſtrained reſolutions of that ſort had brought a ſcandal upon the law. In *Roe ex dem. Noden* v. *Griffiths*, 4 *Bur.* 1960. he expreſſed an opinion nearly ſimilar; and in *Doe* v. *Pott*, *Doug.* 721. he ſaid, all revocations which are not agreeable to the intention of the teſtator, are founded upon artificial and abſurd reaſoning. The abſurdity of Lord *Lincoln's* caſe is ſhocking; however, it is now law.

In *Eccleſton* v. *Speke*, *Carth.* 79. *Comb.* 156. 1 *Sho.* 89. *Holt* 222. it was held, a will duly executed was not revoked by another inſtrument, purporting to be a will in favour of the ſame perſon, but not atteſted by the witneſſes in the preſence of the teſtator, but publiſhed by the teſtator in the preſence of the witneſſes, which is ſufficient in caſe of a bare revocation. And in *Onions* v. *Tyrer*, 1 *P. Wms.* 343. *Prec Ch.* 459.

2 *Vern.*

2 *Vern.* 741. *Gilb. Rep. Eq.* 130. where, in addition to the circumſtances laſt mentioned, the firſt will was cancelled by order of the teſtator, it was held not to be revoked; the cancelling being upon a preſumption that the later will was good and duly executed. In *Goodright ex dem. Glaxier* v. *Glaxier*, 4 *Bur.* 2512. it was ruled that a firſt will, remaining in the teſtator's poſſeſſion uncancelled, was not revoked by a ſecond, which was cancelled by the teſtator. In *Burtonſhaw* v. *Gilbert*, *Cowp.* 49. where the teſtator executed a will, and a duplicate which he depoſited in the hands of another perſon, and afterwards made another will, the ſecond will, and that part of the firſt which he retained in his own poſſeſſion, were at his death together cancelled, and the part which he depoſited with the third perſon, had, at his requeſt, been returned, and was in his poſſeſſion uncancelled; the firſt will ruled to be revoked: The Court agreed that cancelling was an equivocal act, and in order to make it a revocation it muſt be proved *quo animo* it was done. *Vide Bibb ex dem. Mole* v. *Thomas*, 2 *Bl. Rep.* 1043.

2. Lugg *verſus* Lugg.

[Mich. 8 Will. 3. B. R. 1 Ld. Raym. 441. S. C.]

Will of perſonal eſtate preſumed to be revoked by alteration of circumſtances. Vide 1 Salk. 257. S. C. Caſes B. R. 236. Vide 2 Sho. 242.

BEFORE a Commiſſion of Delegates. One being ſingle, made his will, and deviſed all his perſonal eſtate to *J. S.* afterwards he married and had ſeveral children, and died without other will or diſpoſition, and now *coram Delegatis*, of which * *Treby*, C. J. was one, it was ruled, that there being ſuch an alteration in his eſtate, and circumſtances ſo different at the time of his death from what they were when he made the will, here was room and preſumptive evidence to believe a revocation, and that the teſtator continued not of the ſame mind (*a*).

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For Revocation of Uſes, &c. Vide 1 Co. 112, 173, 174. 6 Co. 33, 34. 10 Co. 86, 143. Cro. Car. 472. Chan. Caſ. 242. 2 Lev. 149.

(*a*) The rule in this caſe has been confirmed by many ſubſequent deciſions, and the courts of common law having adopted the principle from thoſe of civil law, the caſes decided in either of thoſe courts are reciprocally conſidered as authority in the others.

The doctrine of revocation of a will by the alteration of circumſtances, is eſtabliſhed to extend to deviſes of lands by *Brown* v. *Thompſon*, 1 *Eq. Ca. Ab.* 413. *Chriſtopher* v. *Chriſtopher*, 4 *Bur.* 2171. *n.* 2182. *Sprang* v. *Stone*, *Ambl.* 721. *Doe ex dem. Lancaſhire* v. *Lancaſhire*, 5 *T. R.* 49. In the laſt caſe the rule was extended to the birth of a poſthumous child, and the Court were of opinion that the principle is not ſo much an intention to alter the will, ariſing from the circumſtances happening afterwards, as a tacit condition annexed to the will itſelf, at the time of making it, that the party does not then intend that it ſhould take effect, if there ſhould be a total change in the ſituation of his family.

The marriage and birth of a child, muſt be both ſubſequent to the making the will, in order to produce a revocation, *Shepherd* v. *Shepherd*, 5 *T. R.* 51. *n. Ward* v. *Philips*, cited *ibid. Getſon* v. *Wells*, cited *Ambler* 490. *Vide Wellington* v. *Wellington*, 4 *Bur.* 2165. *Jackſon* v. *Hurlock*, *Amb.* 487.

In *Thompſon* and *Shepherd*, *Ambler* 490, in marg. marriage and having children were held not a revocation of a will made by a widower who by

by a former wife had children, living at the time he made his will.

In *Gray* v. *Minne*, cited in *Jackſon* v. *Hurlock*, *Ambler* 490. it was held that the preſumption of revocation was repelled by the teſtator having made a proviſion for his children by ſettlement before marriage. In *Jackſon* v. *Hurlock*, Lord *Northington* was of the ſame opinion.

Vide Brady, leſſee of *Norris*, v. *Cobbs*, *Dicg.* 31. In that caſe a perſon deviſed part of his property to certain uſes. He afterwards made a ſettlement, limiting other lands, of the annual value of 1250*l.* (ſubject to a jointure on his intended wife) to himſelf in fee; and then married and had a child, ſubſequent to whoſe birth he referred to the will as a ſubſiſting inſtrument; and it was ruled not to be revoked.

The following note, relative to this ſubject, was taken by the Editor:

"6th *May* 1793.

"In the PREROGATIVE COURT.

"*Wright* againſt *Netherwood*.

[☞ *A.* makes a will, leaving ſome legacies, and appointing his wife reſiduary legatee; ſeiſed, leaving ſeveral children. He married again, and had one child by his ſecond wife. Afterwards *A.* with his wife and all his children periſhed in the waters. The will is not revoked.]

"This caſe aroſe on a queſtion, Whether the will of *George Netherwood*, deceaſed, was or was not revoked?

"On the 24th *June* 1783, the deceaſed married *Elizabeth Lomax*, ſpinſter. On the 8th of *October* following he made his will, whereby he charged his real eſtate with the payment of debts and legacies, if his perſonal ſhould be deficient. He gave ſome pecuniary and ſpecific legacies, and bequeathed *the reſidue* of his *perſonal* eſtate to *his wife* by her maiden name *Elizabeth Lomax*, and deviſed the real eſtate to her for life, remainder to one *Joſeph Netherwood*; he appointed *Wright*, the party, executor of his effects in *England*, and another executor for his effects in the *Weſt Indies*.

"Afterwards *Elizabeth* died, leaving ſeveral children by her huſband. The teſtator married the ſiſter of his former wife, and had iſſue by her one ſon.

"The ſaid *George Netherwood* embarked for *England* from *Jamaica* with his wife, her ſon, and all the children by the former marriage. The ſhip in which they embarked was never afterwards heard of, and was admitted to be loſt.

"The will was proved by the executor in *England*, in common form, and he was afterwards cited by the next of kin of the deceaſed to prove it in ſolemn form, or ſhew cauſe why it ſhould not be declared invalid.

"The facts were admitted on both ſides to be as above ſtated.

"By the inventory the property of the deceaſed appeared to amount to about 8000*l.* The legacies amounted to rather more than 200*l.*

"Sir *William Scott* and Dr. *Nicholl* in ſupport of the will.—The will in this caſe was not revoked by the ſecond marriage and the birth of a child; for although it may be admitted as a general principle, that theſe circumſtances do revoke a will, on the preſumption that upon ſuch a total alteration of circumſtances the teſtator did not continue to have the ſame intentions; that preſumption is liable to be repelled by circumſtances. If it appears to be his intention that the will ſhould ſtand, marriage and the birth of a child will not deſtroy it.

"All preſumptive revocations are *ſtricti juris*, and muſt be wholly inconſiſtent with the deceaſed's intention to diſpoſe of his property according to the will.

"The general principle of theſe revocations is, that when a perſon has contracted ſuch new obligations and relations, it cannot be ſuppoſed that he meant to adhere to his former diſpoſition. That principle is recognized by all the caſes upon the ſubject, and they all proceed upon the ground of a *total alteration* in the teſtator's circumſtances; but if there is not a total alteration, the implication is repelled.

"No caſe can be ſtronger againſt a revocation than this. When he was married

he made a will, by which he ed ſome ſmall legacies, and of the reſt of his property to

This might be in confidence would take care of any chil- hould have by her. The wife l the reſidue becomes lapſed. ies again, and his fortune will ſame courſe in point of ſub- if he had made no will. The ies will belong to the perſons they were given, and the would be ſubject to the ſtatute ation.

ere are caſes in which it has d, that this alteration of cir- es did not amount to a revo- where the alteration was not to make the Court ſay, the ould not in duty adhere to his ich was the caſe of *Brown* and , 1 *Eq. Ca. Ab.* 413., where eld that the alteration of cir- es was not ſufficient to amount vocation; for no injury was perſon, and thoſe whom the vas bound to provide for were ire of (1); which caſe is in the ſame as this; the great ld go to the wife and children; new relations are fully ſatis- d there is no probability of the not intending to adhere to ier diſpoſition. In *Brady* v. *Doug.* 31—38., it is ſaid by *Mansfield*, "that upon his re- n there was no caſe in which and the birth of a child have d to raiſe an implied revoca- ere there has not been a diſ- of the whole eſtate." And that may not be eſſential, it ly very material. Preſumed ons may exiſt where the reſidue mall, but it is otherwiſe where part only is diſpoſed of, and remains. In *Thompſon* and , mentioned in a note to *Amb.* was held that marriage and children did not amount to a on of a will made by a wi- ho had children. It was not mplete alteration of circum- which implies the revocation of a declared intention. A caſe of *Calder* and *Calder*, lately decided in the Prerogative Court, does not apply. It depended on its own circumſtances; and there was no power to preſume that the teſtator adhered to his intention. That was the caſe of a will made by a widower having no children; he had no view to the relations of huſband and father. The great bulk of his property was left away, and there were declarations ſhewing his idea that his property would go to his wife and children upon a marriage ſubſequent to the will; and the will itſelf was ſuch as would involve the family in endleſs litigation. Every circumſtance in that caſe raiſed the implication, that the will ſhould be revoked. No ſuch circumſtances exiſt in this caſe; but, on the contrary, every circumſtance repels the implication.

"There would be a very conſiderable proviſion for the wife and her child; and it muſt be preſumed that he knew the operation of the will; that it diſpoſed of the ſmall legacies according to his intention; that the reſidue would be diſtributable according to law; and that his property would be managed by the reſpective perſons in whom he had repoſed a confidence for the purpoſe.

"The advocates for the plaintiff having here cloſed their arguments, the judge intimated a wiſh, that the caſe might be conſidered upon another point, *viz.* Whether the will (provided it was revoked) did not revive, as the ſon by the ſecond wife did not ſurvive his father? For which purpoſe it ſtood over till the 13th of *May*; when the advocates before-mentioned argued on that point. In caſes where it cannot be actually aſcertained whether the parent or the ſon ſurvived, and they periſhed by the ſame ſtroke of death, according to the *Roman* law, it was preſumed that if the ſon had not attained the age of puberty, the father ſurvived; but if the ſon had attained that age, that he ſurvived the father. This preſumption ariſes from

1) *Vide* the obſervations of *Buller*, J. upon this opinion, in *Doe* v. *Lancaſhire*.

the

the degree of ſtrength ſuppoſed to belong to the reſpective parties. It was liable to certain exceptions in behalf of claims favoured by that law for the intereſt of mothers, and in caſes of fiduciary bequeſts, and the rights of patronage. The general rule of preſumption being applied to the preſent caſe, the child by the ſecond wife being only about a year old, muſt be taken to have died before his father. The queſtion then ariſes, Whether the will, if it was before revoked, was revived by the circumſtance of the father ſurviving?

"By the *Roman* law, a will which was revoked by the birth of a poſthumous child, did not revive by his death, becauſe no change in the father's intention can in that caſe be preſumed; but it was held otherwiſe with reſpect to the *quaſi poſthumi*, or thoſe who were born after the will was made in the teſtator's lifetime. On their death the will was reſtored by the Prætorian law, as upon a new deſignation of intention.

"There is no caſe where it has been held by the law of *England*, that, under theſe circumſtances, a preſumptive revocation does take place. There are two points of time to be regarded in conſidering the effect of the will: 1ſt, The paction: 2d, The conſummation. The will was undoubtedly good when it was made. Was it otherwiſe at the death of the teſtator? The preſumption of the law of *England*, with reſpect to revocations, is not more ſtrong than the *agnatio ſui hæredis* by the civil law, nor ſo ſtrong, for that was an actual revocation, and the other is only a preſumption liable to be repelled. The removal of the cauſe will as ſtrongly imply a renewal of the firſt intention, or rather more ſtrongly, on account of the omiſſion to deſtroy the will; but by the Prætorian civil law it was held, that, upon the death of the *agnatus*, the will was reſtored. It is preſumed, that the reaſon why the teſtator did not revoke the will, was, that he was prevented by death; but, if the child dies firſt, the preſumption is, that, not having revoked the will, he intended it to ſtand. At all events, the teſtator intended t legacies, on account of which alc this diſpute is material, ſhould be ca ried into effect, and that the executc whom he appointed ſhould have t management of his property: And the Court, on a preſumed intent, d cides againſt the will, the actual i tention of the teſtator will be defeate

"Dr *Batten* and Dr. *Swabey* contı Though it may be admitted that t will was originally good, it is a g neral rule that a will is revoked l marriage and the birth of a child.

"In the preſent caſe there was a t tal change in the teſtator's ſituatio from being a widower to becomir again a huſband and a father;—ſuch total change as to raiſe the preſumj tion that he did not intend the will ſtand. It has been decided by S *Geo. Hay*, that the caſes of a widow and a bachelor are the ſame. Thei is no deciſion that the quantum of th property will vary the preſumptio It appears that the caſe of *Brown* an *Thompſon* came on firſt before Sir *Joh Trevor*, Maſter of the Rolls, who held that the will was revoked; and afterwards before Lord Keeper *Wright* who was of a different opinion on ac count of the particular circumſtance of the caſe; and *Buller*, J. in *Doe d. dem. Lancaſhire* v. *Lancaſhire*, 5 *T. R* 49, 61., thought the opinion of th Maſter of the Rolls better than that o the Lord Keeper.

"There are ſome *dicta* of Lorc *Mansfield*, but they are only *dicta*, ir *Brady* and *Cubitt*, that the will is no revoked by marriage and the birth o a child, if it only covers part of th property. In *Doe* v. *Lancaſhire*, th revocation is held to ariſe from a tacit condition at the time of making the will. There may be ſome caſes in which a will is allowed to ſtand, from circumſtances repelling the preſumption; but nothing is more dangerous than to let a particular equity, ariſing from the quantity of the effects, operate againſt a general rule of law. It would introduce a vague and uncertain method of deciſion, and it is better to adhere to a known preſumption of law. The diſpoſition was complete by the will,

th as to the real and perſonal
nd the teſtator has not ſhewn,
alteration in his circumſtances,
ntion to adhere to it. Though
eſtate is not within the juriſ-
of this Court, it may afford an
it in favour of the revocation
as wholly deviſed away.

to the other point.—It is not
ken for granted in this caſe,
ording to the principles of the
aw, that the child died firſt.
ctrine alluded to goes no fur-
n to ſhew, that when the father
periſh by the ſame blow of
he father is ſuppoſed to ſurvive
it ſon. But it does not appear
his caſe they did periſh by the
w of death. The ſhip being
y is all that is admitted; *non*
hat they *died* by ſhipwreck.
neral law is, that the will was
: To take the caſe out of that
revival by the father's ſurviv-
t be ſhewn on the other ſide.
re paſſages in Dr. *Zouch* which
at in teſtamentary caſes the
tion of father or ſon ſurviving
opted.

the *Roman* law, if a will was
the præterniſſion of a child
rwards died, the will was not
rendered valid; or, if it was
by the birth of a poſthumous
ne death of that child did not
; and in caſe of a will becom-
by any ſubſequent cauſe, the
of that cauſe did not reſtore it
ivil law, though it was other-
the Prætorian law, which was
ture of a court of equity, and
vailed for the ſake of the *hæres*
or reſiduary legatee. In this
reſiduary legatee was dead,
ground on which the *jus præ-*
terpoſed fails. Any particu-
ees only had the advantage of
l incidentally, as it was allow-
nd on account of the general
iptus.

poſe this caſe was to be decid-
ne *Roman* law, and the will
e reſtored by ſurvivorſhip, it
t be reſtored in the preſent in-
or no alteration in the father's
can be preſumed to have
taken place after the ſon's death: and it was only upon ſuch preſumption that, after an *agnatio ſui hæredis*, the will was by the Prætorian law reſtored. If the father did ſurvive a few minutes, there is no room to ſuppoſe that he had time to change his intention. But the doctrine of revival is no part of the civil law which has been adopted by the law of *England*. There is a caſe of *Barrow* and *Baxter* decided in this court; it is mentioned in *Ambler* 491. From the regiſter it appears, that the wife brought no fortune and had a ſettlement; there was a child who died before the teſtator, and yet the will was held to be revoked. As a matter of general learning, the *Roman* law is not adopted in theſe caſes by the law of *England*, for they eſſentially differ from each other in many reſpects.

" Sir *Wm. Scott* and Dr. *Nicholl* in reply.—The civil law, upon the grounds which have been already urged, is clearly in favour of the will; and the Court will not attend to diſtinctions between *jus prætorium* and *jus civile*. *Jus prætorium* was as much a part of the general ſyſtem as any other, and in fact it was the predominating and over-ruling authority.

" The caſe of *Barrow* and *Baxter* is certainly contrary to the civil law; and it does not appear if thoſe points were adduced, which in this cauſe have been urged in ſupport of the will.

" With regard to the diſtinction which has been made between the *hæres ſcriptus* and a ſpecial legatee, the latter was as much intended to be benefited as the former.

" It being the eſtabliſhed law that the death of a *quaſi poſthumus* revives the will, the diſtance of the interval between his death and that of the teſtator is not material againſt the preſumption of law. The Court is not to examine by evidence whether there was an actual change of intention or not.

" The law, with reſpect to revocations by marriage and the birth of a child, is, as laid down in *Brady* and *Cubitt*, a mere principle of preſumption; and, in that caſe, all the circumſtances muſt be taken together, and the

the ſtate of the property may be very material. It is extraordinary, if there is any deciſion that a paper diſpoſing of ſmall legacies will be revoked by ſubſequent marriage, &c., that no ſuch caſe appears. The Courts have not gone the length of Lord *Mansfield* in *Brady* and *Cubitt*, by deciding that a revocation does not take place if any property is left: But there is no caſe where marriage and the birth of a child have been held to amount to a revocation, if the will was ſuch as might have been made after theſe relations were contracted, fairly and without injury to the family.

"The diſpoſition in the will in queſtion only extends to a very ſmall part of the property, and might be fairly made by a perſon having a family, the lapſed reſiduary bequeſt being as if it had never exiſted.

"The teſtator having no wife or children at his death, the tacit condition (which in *Doe* and *Lancaſhire* is conſidered as the principle of theſe caſes) may be fairly conſidered as a condition that the will ſhould not take effect if the teſtator ſhould afterwards have a wife and children *who ſurvived* him.

"All the caſes in the courts of common law admit, that the doctrine upon this ſubject is borrowed from the civil law. The Courts have not adopted all the minute rules and diſtinctions, but only ſome of the general principles; and there is no principle better founded on juſtice, than that if a will is revoked by the birth of a child, it is revived by his death in the life of the father.

"Judgment of the Court.

"Sir *Wm. Wynne*.—It is contended on the part of the next of kin, that by marriage and the birth of a child the will became void by implication of law: On the other ſide it is contended, that the particular circumſtances of the caſe rebut that implication.

"It is clearly the general law, that a will made by a bachelor is revoked by ſubſequent marriage and the birth of a child. That there is a diſtinction in the caſe mentioned by *Ambler* is, I think, a miſtake. The principle of the rule is, that the change of circumſtances found a preſumption that there is a change in intention, which may be as ſtrong in favour of a ſecond wife and family as a firſt; and it does not ſeem material whether the will was made by a widower having children, or a bachelor.

"The more weighty argument is drawn from the operation of the will, under the circumſtances which have happened. The teſtator has given legacies which are not very conſiderable and the reſidue to his wife. That gift of the reſidue became void by her death. If he had *left* a ſecond wife and ſon, they would have had their ſhare with the other children. In *Brady* and *Cubitt* it is ſaid by Lord *Mansfield*, that there is no caſe of a revocation where there is not a total diſpoſition, intimating, that the ground of revocation is an entire deprivation. However that may be, if there is an ample portion remaining after a few legacies to friends, there is no deciſion that a will would be revoked. The principle on which the caſes have gone does not militate againſt ſuch a will.

"This caſe is not exactly ſimilar: The teſtator gave the bulk of his property to his wife early after marriage. She lived for ſeveral years, during which all their children were born. The birth of thoſe children would not revoke the will, and he might mean to leave them in the power of their mother. She died; and it is not an improbable ſuppoſition, that he, knowing the effect of the will, ſuffered it to remain. There is a ſtrong ground, then, to contend, that, under thoſe circumſtances, the caſe does not fall within the rule laid down and eſtabliſhed for the revocation of wills.

"I was not aware of the caſe of *Barrow* and *Baxter*, in which the Court ſeems to think the ſubſequent death of the child would not make an alteration; but the point ſeems a good deal like that which has been *vexata quæſtio* in theſe courts, and brought before the courts of common law, whether a will, which is revoked by another, is ſet up by the deſtruction of the ſecond. There was a caſe to that effect

effect before Sir *Geo. Lee* of *Hellyar* and *Hellyar*, in which it was held, that the will being once revoked remained ſo. There was an appeal to the delegates, but it was never determined by them. The caſe of *Glazier* and *Glazier*, 4 *Bur.* 2512., was directly contrary to that; and it was held that the firſt will was good.

"In *Brady* v. *Cubitt* it was laid down by *Buller*, J. that implied revocations muſt depend on the circumſtances *at the time of the teſtator's death*: That makes it material to inquire what thoſe circumſtances were. The fact was, that having embarked, they all periſhed. The *Roman* law has been entered into, and it clearly appears by the Prætorian, which is conſidered as the latter *Roman* law, that the revocation was entire and not preſumptive, and yet the will was held to revive.

"With reſpect to the priority of death, it has always appeared to me more fair and reaſonable in theſe unhappy caſes to conſider all the parties as dying at the ſame inſtant of time, than to reſort to any fanciful ſuppoſition of ſurvivorſhip on account of the degrees of robuſtneſs; and I rather ſuppoſe that is what is meant by Dr. *Zouch* in the paſſages alluded to.

"Then the teſtator, at the time of his death, had neither wife or children. *Buller*, J. ſays, It is to depend on the circumſtances *at the time of the teſtator's death*: There is no circumſtance to raiſe a preſumption that he intended at that time that the will ſhould be revoked.

"On the firſt point I ſhould have great doubt if the preſumed revocation did take place at all.

"On the ſecond, As there were neither wife or children at the death of the teſtator, I am clearly of opinion that the Court ought to pronounce for the validity of the will."

As to parol declarations, *&c.*, concerning the ſubſiſtence or revocation of the will, *vide Brady* v. *Cubitt*, and *Doe* v. *Lancaſhire*, *ubi ſup.*

Riots, Routs, and unlawful Aſſemblies.

See the ſtat. 13 H. 4. c. 7. 2 H. 5. c. 8. 19 H. 7. c. 13. and ſtat. 1 Geo. c. 5. 2 Rol. Abr. 82.

1. Dominus Rex *verſus* Ingram & al.

[Hill. 8 Will. 3. B. R. 1 Ld. Raym. 215. S. C.]

INGRAM and many others were convicted of a riot on 13 *H.* 4. *c.* 7. before two juſtices of peace, together with the ſheriff. *Et per Cur.* 1ſt, If the rioters be convicted on view, the ſheriff muſt be party to the inquiſition; but if the rioters diſperſe before conviction upon view, the ſheriff need not be party, for the juſtices may make the inquiſition without the ſheriff. 2dly, Such inquiſition by two juſtices is *pro domino rege*, and need not be alleged *capt. pro domino rege*, & *corpore comitatus*, as an inquiſition by a grand jury, who inquire as well *pro corpore comitatus*, as *pro domino rege*. 3dly, If the juſtices make

To inquiſition of riot upon view, ſheriff muſt be party, otherwiſe not, and ſuch inquiſition is pro rege only. See 6 Mod. 141. 1 Sid. 186. 1 Keb. 693. Raym. 386. Carth 393. S. C. Comb. 423 Dyer 210. Raym. 386.

make not inquiry within a month after the riot, they are punishable; yet they may inquire after the month, for the lapſe of a month does not determine their authority, but only ſubjects them to a penalty.

Vide 1 Hawk. c. 65. ſ. 31.

2. Dominus Rex *verſus* Heaps.

[Paſch. 11 Will. 3. B. R. 1 Ld.Raym. 484. S. C. 12 Mod. 262. S. C.]

Indictment for a riot and aſſault, acquittal of the riot is ſo of the aſſault. Vide 1 Salk. 384, 385. 2 Show. 93, 149. Vide poſt 642. pl. 14 2 Show. 93, &c.

INDICTMENT, that the defendants *riotoſe & routoſe & illicite aſſemblaverunt, & ſic aſſemblati exiſtentes riotoſe & routoſe inſultum fecerunt in quendam J. Ruſſel, &c.* Upon not guilty, the jury found two defendants guilty, and acquitted the reſt: And it was moved in arreſt of judgment, that two cannot * make a riot, and therefore cannot be guilty of a riot, and that all are acquitted by this verdict. On the other ſide it was ſaid, that the aſſault and battery is charged in the indictment as well as the riot; and two defendants may, as they are found, be guilty of that.

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Vide 3 Mod. 141. Hawkins's P. C. c. 65. Vide 1 Str 196. 3 Bur. 1264.

Sed per Holt, C. J. A riot is a ſpecific offence, and the battery is not laid as a charge of itſelf, but as a part of the riot; for the *riotoſe & routoſe* runs through all, and is aſcribed to the battery as well as the aſſembly. The conſequence is, that theſe defendants being diſcharged of the riot, are diſcharged likewiſe of the battery; and no judgment can be given; and judgment was arreſted.

3. Domina Regina *verſus* Soley & al.

[Trin. 6 Ann. B. R.]

Unlawful aſſembly neceſſary to a riot. Vide Hawk. P. C. c. 65. 2 Hawk. c. 25. ſ. 55. et ſeq. Pop. 121. 2 And. 67. Mour 655. S. C. Holt 353. Rep. A. Q. 100, 115.

INFORMATION that the defendants *tiel jour & lieu ballivum & burgenſes de Bewdley in Guihalda Burgi præd. aſſemblat. ad eligend. ballivum burgi prædict. pro anno tunc prox. ſequent. deſervitur. in electione prædict. procedere vi & armis clamoribus & vociferationibus illicite riotoſe & routoſe impediverunt.* The defendants were found guilty, and upon motion in arreſt of judgment it was held naught. 1. Becauſe it did not appear that any right is claimed, nor any ſuch franchiſe pretended to, ſo that they might be doing an unlawful act (*a*); but if they had ſhewed a right to this franchiſe, this might be a diſturbance to them in

(*a*) This point, which was not neceſſary to the deciſion, ſeems very queſtionable. The law will not ſuffer perſons to ſeek redreſs of their private grievances by dangerous diſturbances of the public peace. *Vide* 1 *Hawk.* ch. 65. ſ. 7.

the

the uſe of it; and to diſturb another in the uſe of his juſt franchiſe, is an unlawful act. *Vide* 29 *E.* 3. 18. It is a treſpaſs, *vide reg.* 94. *Aſſiſt.* 434. *Raſt.* 662. 2dly, Becauſe it is not ſaid that the defendants unlawfully aſſembled; for a riot is a compound offence. There muſt be not only an unlawful act to be done, but an unlawful aſſembly of more than two perſons.

Diſturbing H. in the uſe of his franchiſe is a treſpaſs.

4. Domina Regina *verſus* Soley & al.

[Trin. 6 Ann. B. R.]

INFORMATION, that the defendants *illicite, riotoſe, & routoſe aſſemblaverunt ad pacem perturband. & vi & armis oſtium cujuſdam domus vocat.* the *Guildhall Burgi de Bewdley, clauſum exiſten. de cardinibus riotoſe & routoſe elevaverunt.* The defendants were convicted, and upon motion in arreſt of judgment it was held naught, becauſe it did not appear whoſe houſe it was: If it was the defendants it was not an unlawful act. Every crime muſt ariſe from an unlawful act (*a*). It is ſaid to be *vocat.* the *Guildhall Burgi*, but calling it ſo does not make it ſo. The *Guildhall* may belong to a private perſon as well as the borough. *Vide Dy.* 68. *Yelv.* 28. 3 *Cro.* 200. Yet the Chief Juſtice thought an aſſembly might meet together with ſuch circumſtances of terror as to be a riot. He called it a kind of aſſault upon the people. *Vide Hob.* 91. 1 *Mod.* 73. *Weſt. Preced.* 149. *Lamb.* 108. 3 *Keb.* 623. 1 *Ro. Rep.* 49. 3 *Mod.* 3. *Moor* 786. *pl.* 1086.

Unlawful act to be done neceſſary to a riot. Vide 3 Inſt. 176. Hawk. P. C. 157. S. C. Holt 353. Rep. A. Q. 100, 115. Vid. Hob. 92. 5 Co. 91. b.

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(*a*) *Vide* note to the preceding caſe.

5. Domina Regina *verſus* Ellis.

[6 Ann. *At* niſi prius in Middleſex, *coram* Holt, *C. J.*]

INDICTMENT againſt four defendants, for that they did rioteuſly aſſemble, and *vi & armis* beat and wound one *Ellis*. Upon *non cul.* it appeared at the trial, that *Ellis*, who was the *Enfield* ſtage-coachman driving to *London* in the highway, the defendants, one in a chaiſe, and the reſt on horſeback, overtook him, and that the chaiſe was overturned by the coach, but not through any fault of the coachman; but that the driver of the chaiſe and his company taking offence at it, followed the coachman and beat him barbarouſly. It was objected upon this evidence, that this was a treſpaſs, but not a riot, becauſe the company was lawfully aſſembled. *Et per Holt*, C. J. 1ſt, If ſeveral are aſſembled lawfully without any evil intent,

If three, or more, aſſemble lawfully, and quarrelling, fall upon one of their own company, it is no riot; if on a ſtranger it is, but in thoſe only who concur. See 1 Mod. 13. cont. 2 Keb. 558. 6 Mod. 43, 114. acc. S. C. Holt 636.

tent, and an affray happens, none are guilty but ſuch as act; but if the aſſembly was originally unlawful, the act of one is imputable to all.

Vide 1 Hawk. c. 65. ſ. 3.

2dly, If three, or more, are lawfully aſſembled, and quarrelling, all fall upon one of their own company, this is no riot; but if it be on a ſtranger, the very moment the quarrel begins they begin to be an unlawful aſſembly, and their concurrence is evidence of an evil intention in them that concur; ſo that it is a riot in them that act, and in no more. So ruled, and ſo found by the jury.

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[596] Vid. tit. Motion.

Rules of Court.

1. *Sir* James Butler's *Caſe.*

[Mich. 8 Will. 3. B. R.]

Defeating a rule of Court by a ſtranger, is a contempt.

UPON a rule of reference to arbitrators, they make an award for the plaintiff, and a ſtranger by contrivance defeats the party of the benefit of this award. *Per Cur.* It is a contempt to the Court, and an attachment ſhall be granted; for it ſhall not be in any one's power to defeat the rules of this Court, or render them ineffectual.

2. Anonymous.

[Mich. 8 Will. 3. B. R.]

Conſtrued largely.

IF a man enters into a rule in *B. R.* not to ſue execution upon a judgment, and brings an action of debt upon the judgment, it is a breach of the rule. *Per Cur.*

3. Gregg's *Caſe.*

[Paſch. 5 Ann. B. R.]

Where an adminiſtrator ſues, cannot bring money into court. See 6 Mod. 11, 25,

PER Holt, C. J. at the ſittings at *Guildhall*, in an action by an adminiſtrator: The defendant cannot bring money into Court, becauſe the adminiſtrator is not by law to pay coſts; and, *Paſch.* 5 *Ann. B. R.*, in *Gregg's* caſe, an action was brought by an executor for money due to

to his teſtator for law-buſineſs done by him, it was moved to bring ſo much money into Court, but denied (*a*).

Covenant and breach for non-payment of rent, and for not repairing, *&c.*, it was moved to bring in ſo much for the rent; and as to the other breach, that the plaintiff might proceed as he thought fit. *Et per Trevor*, All the judges have agreed, (for he put the caſe to *Holt*, C. J.) that it is but reaſonable to allow it: That it does not differ from debt for rent; for though it be covenant, yet it is a covenant for payment of a ſum certain. The ſame diverſity was taken between *covenant* for a ſum certain and *choſe* incertain, *per Holt*, C. J., *Hill.* 9 *Will.* 3. *B. R.*, ſaying it did not differ from an *indebitatus aſſumpſit*. *Et Trin.* 12 *W.* 3. *B. R.*, ſame rule (*b*).

101, 153. Ante 593. H. 2 Ann. C. B. Money may be brought into court; in covenant for rent, debt for rent, replevin and avowry for rent. S. C. 1 H. Black. C. B. 24. Ante 89, 593. Mod. Caſes 29. 1 Salk. 130. Holt 472.

In a *quantum meruit* bringing money into Court was denied. *Hill.* 8 *Will.* 3. *B. R.*; but, *Paſch.* 5 *Ann. B. R.*, it was allowed *ex motione magiſtri Raymond.*

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Quantum meruit.

In trover for a horſe, bridle, and ſaddle, it was moved to bring the ſaddle and bridle into court, but denied, *Trin.* 2 *Ann. B. R.*, *Wilcock*'s the attorney's caſe (*c*).

Replevin, defendant avows for rent, and plaintiff admitted to bring it into court. *Hill.* 10 *W.* 3. *B. R.* (*d*)

In ejectment upon an entry for non-payment of rent, the Court ſtaid all proceedings upon bringing all the rent into court (*e*), and accepting a new leaſe and ſealing a counterpart. *Downes* verſus *Turner*, *Mich.* 8 *Will.* 3. *B. R.*

(*a*) *R. Crutchfield* v. *Scott*, *Str.* 796. that in an action by an executor the defendant may pay money into court; and it was held that the effect of it would be not to make the executor pay, but only loſe ſubſequent coſts. *Vide Barnes* 280.

(*b*) In covenant, a defendant was allowed to pay money into court upon breaches for nonpayment of rent, and money agreed to be paid for plowing meadow land; but not generally. *Fullwell* v. *Hall*, 2 *Bl. Rep.* 837.

(*c*) In the caſe of *Fiſher* v. *Prince*, 3 *Bur.* 1363., the following rule was laid down *per Curiam*: Where trover is brought for a ſpecific chattel, of an aſcertained quantity and quality, and unattended with any circumſtances that can enhance the damages above the real value, but its real and aſcertained value muſt be ſole meaſure of the damages; there the ſpecific thing demanded may be brought into court. Where there is an uncertainty either as to the quantity or quality of the thing demanded, or there is any *tort* accompanying it that may enhance the damages above the real value of the thing, and there is no rule whereby to eſtimate the additional value; there it ſhall not be brought in.

In *Whitten* v. *Fuller*, 2 *Bl. Rep.* 902. on trover for a bond, a rule to ſtay proceedings on delivering up the bond and payment of coſts, was diſcharged; the plaintiff inſiſting to go for ſpecial damages, as the obligor had died during the detention.

(*d*) *R. acc. Vernon* v. *Wynne*, 1 *Hen. Bl.* 24. *Vide Barnes* 429.

(*e*) By ſtat. 4 *G.* 2. ch. 28. if the tenant, at any time before trial in ejectment for nonpayment of rent, pay to the leſſor or his attorney, or into court, all the rent due and coſts, all proceedings in the ejectment ſhall ceaſe.

In debt for rent, it was moved to bring ſo much into court (*a*), and *Holt*, C. J. thought it hard; he ſaid he remembered the *beginning* of theſe motions; the firſt was to bring in principal and intereſt upon a bond; after that it came to an *indebitat. aſſumpſit*: It has been done in debt for rent, but not ſo freely; we do it in ejectment on a ſpecial reaſon, *viz.* becauſe that action ſubſiſts entirely upon the rules of the Court. *Per Holt*, C. J. *Paſch.* 10 *W.* 3. *B. R.*

In debt upon a bond (*b*); defendant muſt bring in the whole penalty, or the Court will not ſtay proceedings. *Hill.* 9 *W.* 3. *B. R.* But *ſemble ne poet eſtre* without bringing in the whole money. If the parties diſpute the *quantum*, and there is a diſpute how much is due, *ne poet eſtre referre*. *Trin.* 11 *W.* 3. *B. R.* (*c*)

(*a*) It may be brought into court, *Barnes* 280.

(*b*) By ſtat. 4 and 5 *Ann.* ch. 16. in any action on a bond with a penalty, with condition for payment of a leſſer ſum at a day or place certain, on bringing into court all the principal and intereſt due, and all coſts in law or equity (*vide Stiles* v. *Newton*, *Str.* 639. *Lock* v. *Sherman*, *B. R. Hard.* 116.), it ſhall be taken in ſatisfaction of the bond.—Upon bonds for payment of money by inſtalments, the inſtalments in arrear may be brought into court, *Lucas* v. *London*, *Str.* 938. *Barnes* 288. *Vide* 3 *Bur.* 1374. The defendant had leave to pay the penalty on a bond to indemnify a pariſh againſt a baſtard into court, *Branguin* v. *Perrot*, 2 *Bl. Rep.* 1190.

(*c*) In *Str.* 787. it is ſaid that the firſt motion to bring money into court was in *Kelyng*'s time, and introduced to avoid the hazard and difficulty of pleading a tender.

In actions for mere *tort*, it has been repeatedly determined that money cannot be paid into court, *e. g.* for immoderately driving a hired chaiſe, *White* v. *Woodhouſe*, *Str.* 787.; or for dilapidations, *Squire* v. *Archer*, *Str.* 907.; or for meſne profits after judgment in ejectment, *Heldfaſt* v. *Morris*, 2 *Wilſ.* 115.

Neither can it be brought in upon covenant to render the beſt beaſt or pay money at the *plaintiff*'s election, *Barnes* 289.; nor on a bond from a bailiff for his good behaviour, *Barnes* 205.; nor on bond for performance of covenants in a leaſe, *Barnes* 286.

The general rule is laid down in *Hallet* v. the *E. I. Comp.* 2 *Bur.* 1120. as follows: "Where the ſum demanded is a ſum certain, or capable of being aſcertained by mere computation, without leaving any other ſort of diſcretion to be exerciſed by the jury, it is right and reaſonable to admit the defendant to pay the money into court, and have ſo much of the plaintiff's demand upon him ſtruck out of the declaration: and that if the plaintiff will not accept it, he ſhall proceed at his peril."

In aſſumpſit againſt a carrier, the defendant was allowed to bring a ſum of money into court, upon an affidavit that he had publiſhed an advertiſement that he would not be anſwerable beyond that ſum without a ſpecial entry, *Hulton* v. *Bolton*, *Hen. Bl.* 299. *n.* In *Gunning* v. *Moris*, 5 *Term R.* 87. the declaration ſtated that the defendant was indebted in a ſum of *Engliſh* money on bond in a ſum of proclamation money of *North Carolina* (dated before the *American* war); an application to pay into court the amount of the penalty in proclamation money was diſcharged, proclamation money having ſince the forfeiture loſt its value. *Groſe*, J. ſaid, We ought not to permit money to be paid into court, and

to

to ſtay the proceedings, except where the juſtice of the caſe requires it; and this is not ſuch a caſe.

In an action on which money cannot be regularly brought into court, (*e. g.* againſt an attorney for negligence,) if the plaintiff takes it out he waives the irregularity, *Griffiths* v. *Williams*, 1 *T. R.* 710. Money may be brought into court in actions upon penal ſtatutes, *Str.* 1217.; and if two penalties are ſued for, the amount of one may be paid generally, *Stock* v. *Eagle*, 2 *Bl. Rep.* 1052. In an action againſt three, one ſuffered judgment by default, another was outlawed, the third was not allowed to pay money into court, *Kay* v. *Panchiman*, 2 *Bl.* 1029.

4. Elliot *verſus* Callow.

[Mich. 9 Ann. B. R.]

Though plaintiff is nonſuit, yet he ſhall have money brought in upon ſtriking it out of the declaration.

DEFENDANT brought money, *viz.* 10 *l.*, into court, and had it ſtruck out of the declaration. Afterwards the plaintiff ſuffered a nonſuit; and the queſtion was, Whether he ſhould be allowed to take this money? *Et per Cur.* He ſhall (*a*); for ſo much the defendant has admitted

(*a*) The plaintiff is entitled to have the money out of court, though he proceeds and has judgment which is arreſted, *Fiſher* v. *Kitchingman*, *Barnes* 284. If a verdict is given for the defendant, he may have the money paid in towards his coſts, *Barnes* 280. *anon*, but if the plaintiff is a pauper it is otherwiſe, *Lee* v. *Holland*, *Bunb.* 287. Conſequently the plaintiff is in all caſes entitled to the ſurplus, if any, after deducting coſts. Money paid into court under a rule, being a payment on record, the party can never recover it back, though it afterwards appear that he paid it wrongfully. *Per Buller*, J. *Malcolm* v. *Fullarton*, 2 *T. R.* 648.

In *Cromp. Prac.* 147. it is laid down, that if the plaintiff declares in aſſumpſit on an agreement, and defendant pays money into court, he admits the agreement, if the declaration is upon the agreement only; but if there are other counts, he may pay money into court on one of thoſe counts, and then he will not admit the validity or extent of the agreement. In *Banough* v. *Skinner*, 5 *Bur.* 2639. being an action againſt an auctioneer, for a depoſit upon a void ſale, the defendant having paid money into court, the court were clear with the plaintiff as to the merits, and thought the defendant had *acknowledged himſelf to be liable* to the action by paying money into court. In *Cox* v. *Parry*, 1 *T. R.* 464. the defendant paid money into court upon an action on a policy of inſurance; the plaintiff proceeded to trial, and obtained a verdict for a larger ſum; but the court, on a motion for a new trial, were of opinion that the policy was void; whereupon a queſtion aroſe, Whether the defendant, by paying money into court, had not precluded himſelf from making the objection; as to which it was held, that paying money into court admits the plaintiff has a right to maintain the action, and reduces the queſtion ſimply to the *quantum* of damages which he is entitled to recover. In that caſe, if the defendant had not paid money into court the plaintiff muſt have been nonſuited, he has admitted that the plaintiff is entitled to maintain his action *to the amount of that ſum*; but nothing more. He does not vary the conſtruction and import of the policy ſo as to entitle the plaintiff to recover beyond that extent. In *Jenkins* v. *Tucker*, *H. Bl.* 90. the defendant having paid money into court demurred to the evidence, which Lord *Loughborough* ſaid ſtruck him as very abſurd,

mitted to be due, and ſo much he has actually paid him; and if the cauſe had gone on to trial, there muſt have been a verdict for the plaintiff as to ſo much; for this is admitted to be due, and paid down as the plaintiff's money; otherwiſe perhaps of money paid into court by way of tender. If a man pleads a tender *& uncore priſt*, and pays the money into court, and the plaintiff takes iſſue on the tender, and it is found againſt him, the defendant ſhall have the money. *Sty.* 388.

Vide Rep. B. R. Temp. Hard. 206. Barnes 284. Pract. Reg. 250. Caſ. of Prac. C. B. 36.

abſurd, ſince the defendant admits a cauſe of action, ſo that there can be no ſuch a thing as a nonſuit (1), and alſo becauſe it was for the jury to determine upon the *quantum* of damages. If the plaintiff takes the money out of court in the firſt inſtance he is entitled to coſts up to the time of paying it in. Where he proceeds afterwards, but diſcontinues or accepts the money, *&c.* before trial, he is entitled to coſts to the time of paying it in, and the defendant to ſubſequent coſts, *Barnes* 280, 282, 284, 287, 357. *Hartley* v. *Bateſon*, 1 *T. R.* 629.; but if he proceeds to trial, and a verdict goes againſt him, *Stevenſon* v. *Yorke*, 4 *T. R.* 10.; or he is nonſuit, *Kabell* v. *Hudſon*, *id. ibid.*; or juror is withdrawn, *Stodhart* v. *Johnſon*, 3 *T. R.* 657.; he is not allowed any coſts. If the defendant pay the money on particular counts, the plaintiff, on taking it out, is in the King's Bench only entitled to his coſts on thoſe counts, *Bailie* v. *Cazelet*, 4 *T. R.* 579. The contrary was ruled in *C. B. Hellier* v. *Hallett*, *Barnes* 286. The plaintiff muſt give the appointment for taxing, *Kabell* v. *Hudſon*.

The Court of King's Bench, in a caſe where the action was attended with oppreſſive circumſtances, allowed the debt to be paid into court without coſts, *Johnſon* v. *Houlditch*, 1 *Bur.* 578.

(1) *Qu. & vide Kabell* v. *Hudſon*, *infra*.

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[598] Scire Facias.

1. Panton *verſus* Hall.

[Trin. 1 W. & M. B. R. Rot. 130.]

Judgment againſt two; ſcire facias againſt one, ill. Vide poſt 601. Fareſt. 3, 4, 6. S. C. Carth. 105. Vide Co. Ent. 621. a. 1 Rol. Ab. 888. 10 Vin. 547. Allen 21. S. C. 3 D. 334. p. 6. Vide Skin. 82.

A Judgment in debt was recovered againſt *A.* and *B.*, and a *ſcire facias* awarded againſt the tertenants and the heir of *B.* The ſheriff returned a *ſcire feci* as to the heir, and returned ſeveral perſons tertenants *in balliva ſua*, warned; they appear and plead in abatement, no *ſcire facias* had been awarded againſt *A.* The plaintiff replied, that he at ſuch a time ſued out a *ſcire facias* againſt *A.*, and ſet it forth. This replication was held naught on demurrer, for a *ſcire facias* is a judicial writ, and muſt purſue

the nature of the judgment; therefore as the judgment is joint, ſo ought the *ſcire facias*; whereas here they are as ſeveral independent ſuits. 2 *Ro.* 276. 20 *H.* 7. 3. *Cro. Car.* 517.

2dly. The return is ill, for it ſhould not be, that *A.*, *B.*, and *C.* are tenants of lands *in balliva ſua*, but *A.*, *B.*, and *C.* are tenants of all the lands *in balliva ſua*.

Return of ſci. feci againſt tertenants ought to be of all the tertenants in balliva ſua. Herne 326. 2 Brownl. 392.

2. Tully's *Caſe*.

[Hill. 6 Will. 3. B. R.]

IN *error* to reverſe a fine, though in ſtrictneſs of law a *ſcire feci* being returned againſt the conuſees, is ſufficient; yet for fear of purchaſers, and in favour of them, there ſhall be a *ſcire facias* againſt the tertenants.

Error to reverſe a fine. 3 Mod. 274. 1 Salk. 339. Vide Hard. 163. Comb. 318. Dyer 321. Co. Ent. 233. Cro. El. 474, 739. Mo. 524.

3. Hardiſty *verſus* Barny.

[Hill. 7 Will. 3. B. R.]

IF a judgment be above ten years ſtanding, the plaintiff cannot ſue a *ſcire facias* without motion in court (*a*); if under ten, but above ſeven, he cannot have a *ſcire facias* without a motion at ſide-bar. *Note*; If after ſuch motion and judgment revived by *ſcire facias*, the defendant dies before execution, the plaintiff muſt ſue a new *ſcire facias*, but may have it without motion; for the judgment was revived before. *Per Cur.*

Where ſcire facias ſhall iſſue on motion, and where without. S.C. Comb. 356.

(*a*) In *Coyſgaine* v. *Fly*, 2 *Bl. Rep.* 995., on a judgment of above twenty years old, and in *Bagnall* v. *Gray*, *id.* 1140., on a judgment of ten years old, the Court of *C. B.* gave leave to ſue out a *ſci. fa.*; but execution only to iſſue on a return of *ſcire feci*, or an affidavit of perſonal ſervice on the defendant.

4. Anonymous. [599]

[Trin. 8 Will. 3. B. R.]

IN *C. B.* there is but one *ſcire facias* (*b*), and upon *nihil* returned execution. In the King's Bench there are two *ſcire facias*'s and two *nihils* returned, and heretofore both

Rule for ſuing out and returning ſcire facias. Fareſt. 5, 6, 40.

(*b*) On which there muſt be fifteen days between the *teſte* and return, *Imp. C. B.* 513.

were

56, 68, 69, 138. 6 Mod. 86, & infra, pl. 7 & 12. Cumberb. 452, 428. Prac. Reg. 495.

were ſued out together by making the *teſte* of the ſecond as if the firſt were returned; but now the Court made a rule that both ſhould not be ſued out together, but the firſt ſhould be duly returned before the ſecond ſhould be ſued out, and that the ſecond ſhould be teſted the day of the return of the firſt.

5. Lugg *verſus* Goodwin.

[Mich. 10 Will. 3. B. R. 1 Ld. Raym. 393. S. C.]

Againſt principal in hac parte, and bail in ea parte. Farell. 4. S. C. Caſes B. R. 214.

A *Scire facias* upon a judgment againſt the principal defendant was, *in hac parte*. *Et per Holt*, C. J. on ſearch of precedents; where it is againſt the defendant himſelf, it ſhould be *in hac parte*; where againſt the bail, *in ea parte* (*a*), and this will reconcile the precedents.

(*a*) *In hac parte* againſt bail, ruled to be ſufficient, and ſaid by *Holt* to be the moſt proper, Lord *Raym.* 532. *Bringar* v. *Allanſon*.

6. Anonymous.

[Trin. 11 Will. 3. B. R.]

Scire facias againſt bail muſt lie in the ſheriff's hands a convenient time. Bur. 1360.

A *Capias ad ſatisfaciendum* againſt the principal in order to charge the bail muſt lie four days excluſive in the ſheriff's office, but there is no ſet time for a *ſcire facias*. Same rule laid down *Mich.* 10 *W.* 3. *B. R.* But a *ſcire facias* againſt bail muſt lie a convenient time, and the firſt *ſcire facias* may be antedated even in term-time, *per Clarke* ſecondary. *Sed per Holt*, C. J. It cannot be antedated where it iſſues by rule of Court (*b*).

(*b*) The Court will not examine whether a *ca. ſa.* be actually returned before the iſſuing of the *ſci. fa.* the leaving it in the ſheriff's office is a notice to the bail that the plaintiff will proceed againſt the perſon of the defendant, *Hunt* v. *Cox*, 3 *Bur.* 1360. 1 *Bl.* 393. The *ſcire facias* muſt lie in the office four days, *Agr. Millar* v. *Garraway*, 3 *Bur.* 1723. *R.* that it muſt lie in the office the laſt four days before the return, *Forty* v. *Hermer*, 4 *T. R.* 583.

7. Goodwin *verſus* Peek.

[Mich. 11 Will. 3. B. R. Comyns 53. S. C.]

Fifteen days incluſive between teſte of firſt and return of laſt, ſufficient. Vide

THE firſt *ſcire facias* was teſted the 24th day of *October*, and returnable the 31ſt *day* of *October*; the *alias* was teſted the ſame day, returnable the 7th day of *November*; *Shower* objected, there ought to be fifteen days excluſive

cluſive between the *teſte* of the firſt and return of the laſt. But the Court held, that here being fifteen days incluſive, it was very well, and the practiſers agreed it. *Vide* 2 *Jones* 228. (*a*)

poſt 602. 1 Lutw. 26. Mod. Caſes 146. S. C. Carth. 468. Caſes B. R. 215. Holt 759. Str. 1139.

(*a*) *Vide Peale* v. *Watſon*, 2 *Bl. Rep.* 922. Four days excluſive are ſufficient between the *teſte* and return of the *ſci. fa.* when the proceedings are by bill.

8. Proctor *verſus* Johnſon.

[600]

Vide 3 Lev. 100. Lutw. 1268.

[Paſch. 13 Will. 3. B. R. 1 Ld. Raym. 669. S. C.]

ON a judgment in ejectment in *C. B.*, a *ſcire facias* was brought againſt the caſual ejector, ſuggeſting, that ſince the judgment *A.* and *B. ingreſſi ſunt & modo tenent.* And on demurrer, judgment given *quod haberet execution.*, and upon this award of execution a writ of error was brought in *B. R.*, where the objection was, that a *ſcire facias* lay not on a judgment in ejectment; for at common law it lay only in real actions; and the ſtatute gives it only in perſonal. *Vide* 2 *Inſt.* 469. *Et per Holt*, C. J. 1ſt, At common law there was a *ſcire facias* on a judgment in real and mixed actions. It lay on a judgment in aſſize, for the land was bound by the recovery, which was a good title, and there was no other way to execute the judgment upon change of parties, as there was in caſe of judgment for debt and damages, where debt lay on the judgment.

Scire facias lies on a judgment in ejectment. Ante 258.

2dly, The *ſcire facias* may either be general againſt all tertenants, or againſt the tertenants, naming them (*b*).

Writ general.

3dly, That ſtrangers may falſify, but thoſe that claim under the judgment are eſtopped and bound by the judgment.

(*b*) In *Comb.* 282. it is ſaid, that if a perſon undertakes to name them, he muſt be ſure to name them all.

9. Withers *verſus* Harris.

S. C. ante 258. 3 D. 331. p. 11, 332. p. 6. Far. 50, 64. 3 Salk. 319. Holt 77, 265.

[Mich. 1 Ann. B. R. (*Vide* this caſe, title *Ejectment*, pl. 11.) 2 Ld. Raym. 806. S. C.]

IT was ſaid by *Holt*, C. J. I am not ſatisfied with the opinion of my Lord *Coke* on *Weſt.* 2., that at common law no *ſcire facias* lay on a judgment in a perſonal action, till *Weſt.* 2., for the words *ſive alia quæcunq; irrotulata* came after *contractus* and *conventiones*, and therefore cannot be conſtrued of judgments; but the law has been otherwiſe taken, and I muſt ſubmit; it is plain it lay on a judgment in annuity.

Whether ſcire facias lay in perſonal actions before Weſt. 2.

S. C. ante 564. Poſt 659. 6 Mod 132, 42. 3 D. 314. p. 6. Holt 612.

10. Shuttle *verſus* Wood.

[Mich. 2 Ann. B. R.]

Scire facias againſt bail in B. R. muſt be brought in Middleſex, and not elſewhere. Lutw. 1286. 3 Lev. 235, 245. Cro. Jac. 331. Hob 195. Aleyn 12. 1 Cro 312. Barnes 96. 2 Bl. Rep. 769. 1 Bur. 409. 2 Cromp. Prac. 81.

ON a recognizance taken in *B. R.*, the *ſcire facias* muſt be brought in *Middleſex*; for the recognizances there are not obligatory by the caption, but by their being entered of record in the court; ſo it is of debt: But on a recognizance in *C. B.*, the *ſcire facias* may be laid in the county where the caption was, or in *Middleſex* where it is filed; for it is a record by the caption, and becomes immediately obligatory, and therefore may be brought there, and it is alſo filed at *Weſtminſter* in *C. B.*, and there remains of record. *Vide Al.* 12. 1 *Cro.* 312. *Hob.* 195.

[601]

S. C. 1 Salk. 40. and poſt 679. 6 Mod. 134, 199, 226. 3 Salk. 321.

11. Adams *and* Tertenants of Savage.

[Mich. 3 Ann. B. R. 2 Ld. Raym. 1253. S. C.]

Holt 179. Lilly Ent. 398.

Tertenants returned for ſeveral parts cannot join in a plea which goes to one part only. See before 598. pl. 1. 2 Saund. 23. Fareſt. 15. 6 Mod. 134, 199.

AN adminiſtrator brought a *ſcire facias* on a judgment recovered by his inteſtate againſt *H*, and the writ was general againſt ſuch as were tenants of the land of *H.* at the time of the judgment. The ſheriff returned ſeveral tertenants warned; among the reſt one *A.*, ſeiſed of a meſſuage and of a manor called *D.* The tenants appear, and all join in this plea, *viz.* that *J. S.* is ſeiſed of the freehold of the manor of *D.*, *& petunt judicium de brevi, & quoad breve ill. caſſetur. Et per Curiam* the plea was held ill; and reſolved,

1ſt, That the tertenants cannot join in this plea, becauſe they are ſeverally returned, one for one part, and another for another.

Where non-tenure may be pleaded generally or ſpecially. Vide ante 569. 3 Keb. 25, 50. 3 Lev. 205. 6 Mod. 226. 1 Keb. 55, 310, 351, 352. 2 Keb. 587, 636.

2dly, This is pleading a *non-tenure* by implication as to the manor of *D.* Now in a *ſcire facias* on a judgment in debt, or any perſonal action, the defendant cannot plead *non tenure* generally, becauſe it is contrary to the return of the ſheriff, but he may plead a ſpecial *non tenure* in ſuch caſe; and ſo the law is now after long and great difficulty ſettled. 3 *Cro.* 872. 8 *E.* 4. 19. 9 *H.* 5. 11. But in a *ſcire facias* for execution in a real action, the defendants may plead a general *non tenure*; becauſe their freehold, which is much favoured in law, is in queſtion.

2 Saund. 23. 1 Mod. 29. 1 Sid. 436. 2 Keb. 529, &c. Mo. 525.

3dly, The tertenants in this caſe may plead there be other tertenants not named in the ſame county, and pray judgment if they ought to anſwer, *quouſque* the others be ſummoned, but ought not to pray, *quod breve caſſetur*; for the Court ought never to abate the writ, but where the plaintiff can have a better writ; otherwiſe if the

writ

writ had been particular in naming the tenants. *Vide* 2 *Saund. Jeffreyſon* verſus *Dawſon*, a good precedent: And they ſeemed to doubt whether the tertenants could plead other tertenants not warned in another county (*a*); and the Chief Juſtice cited *Owen* 104., that tenant for years may be a good tenant to plead in bar to a *ſcire facias* to a perſonal action where damages are recovered, but not in a real action. *Vide Co. Ent.* 702, 624., 2 *Cro.* 506. *Cro. El.* 740. 2 *Saund.* 8. *Palm.* 241. 2 *Ro. Rep.* 53.

(*a*) It has been decided that they may ſo plead, *vide Prynne* v. *Slaughter*, 2 *Vent.* 104. 4 *Bac. Ab.* 419. *Clift.* 672.

12. Ball *verſus* Manucaptors of Ruſſel. [602]

[Trin. 4 Ann. B. R. 2 Ld. Raym. 1176. S. C.]

Scire facias on recognizance of bail aſſigning breach, that the defendant did not pay nor render priſonæ Mar. Mareſ. noſtræ, ſufficient. Vide Lutw. 1273.

SCIRE *facias* againſt bail, ſetting forth, *quod cum querens recuperaſſet* againſt one *Ruſſel*, and the defendants *devenerunt plegii*, that he ſhould either pay *vel ſe reddere priſonæ Mareſc. Mareſchal. noſtræ.* The defendant prayed *oyer* of the recognizance; and that was, that he ſhould pay, *vel ſe reddere priſonæ Mareſchalli Mareſchalſiæ dominæ reginæ coram ipſe regina, quo lecto & audit.*, the defendant pleaded, that there was no *capias ad ſatisfaciend.* returned againſt the principal; the plaintiff replied, there was a *capias ad ſatisfaciend.*, and ſet it out; the defendant demurred. It was objected by *Pengelly*, that the *oyer* given was defective, not ſhewing of what term the recognizance was, ſo that it did not appear to warrant the *ſcire facias*, or that it is what the *ſcire facias* is brought upon: That the *capias* ſet forth appears to have but four days between the *teſte* and return, and that there is no breach aſſigned by the *ſcire facias*, for the render by the recognizance ought to be to the marſhal of the King's Bench priſon; but the breach is, that he did not render himſelf *priſonæ Mareſchalli Mareſchalſiæ noſtræ*, which is the priſon of the palace. *Vide* 10 *Co.* 68. *b. Theſ. Br.* 233. *N. Br.* 251. *J.* 5 *E.* 3. *c.* 8., and *Spelm. Gloſſ. in hoc verbo.* To this it was anſwered and reſolved by the Court,

1ſt, That though the *oyer* be imperfect, yet there is no variance between the *ſcire facias* and recognizance, and ſince they agree together, the recognizance is a ſufficient ground for the *ſcire facias*; but the defendant ſhould not have gone on, but inſiſted upon his want of *oyer*.

Eight days muſt be between the teſte and return of capias ad ſatisfac. againſt the

2dly, There ought to be eight days between the *teſte* and return of the *capias ad ſatisfaciendum* againſt the principal, by the practice and courſe of the Court; and if the defendants had moved for the irregularity, the Court would have

principal in order to charge the bail.

have helped them: But in point of law, the proceſs of this Court may be returnable *de die in diem*, eſpecially into *Middleſex*; and therefore they ſhall not take advantage of this which is but an irregularity, upon demurrer.

Vide ante 599. pl. 7. 439. Fareſl. 40, 96, 138. 1 Lutw. 26. Q. 6 Mod. 86. Mod. Caſes 146.

3dly, All other marſhalſeas were derived from the Earl Marſhal of *England*, and the Marſhal of the Houſhold is never ſtiled *Mareſchallus Mareſchalſiæ noſtræ*; and this being a *ſcire facias* on a recognizance of bail taken here, the marſhal here muſt be intended the marſhal of this Court. *Judicium pro quer.*

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13. Attwood *verſus* Burr.

S. C. ante 87, 402. Fareſl. 3. Carth. 417. 3 Salk. 369. Lilly Ent. 225, 403.

[Paſch 5 Ann. B. R. 2 Ld. Raym. 1252. S. C.]

Judgment on a ſcire facias againſt bail, reverſed for want of warrant of attorney. 5 Mod. 397. called Attwood verſ. Duell. 1 Salk. 89, 402. 6 Mod. 304. Comberb. 149, 261.

A Writ of error was brought upon the award of execution on a *ſcire facias* againſt bail, and thereupon the record of the judgment againſt the principal was alſo returned. It was aſſigned for error, that the *ſcire facias* was ſued out and proſecuted by *J. S.* his attorney; but no warrant of attorney entered of record. It was anſwered, that *J. S.* appears to have been the attorney in the principal cauſe, and in that to have had a warrant, but the Court reverſed the judgment; for the record againſt the principal need not have been certified upon this writ of error, and the ſuit againſt the principal was another diſtinct ſuit; therefore there ought to be a particular warrant of attorney for this *ſcire facias* againſt the bail, and this warrant ought to be entered, not before the writ ſued; for any body may ſue out the *ſcire facias*; but upon the return thereof, for then the ſuit commences (*a*).

(*a*) *R.* That it is ſufficient if the warrant of attorney be entered of the term the *placita* is of, though the writ is returnable, and the party appears the preceding term, *Henriques and others* v. *the Dutch W. I. Com.* 2 Ld. *Raym.* 1532. 2 *Str.* 807. *Vide Richards* v. *Brown, Doug.* 113. *Vide ſtat.* 25 *G.* 3. *c.* 80. *ſ.* 13 to 19. A *ſci. fa.* is an action, *Co. Lit.* 290. *b. Treviban* v. *Lawrence*, 2 Ld. *Raym.* 1058. *Barlow* v. *Evans*, 1 *Wilſ.* 98. *Grey* v. *Jones*, 2 *Wilſ.* 251. *Pultney* v. *Townſon*, 2 *Bl. Rep.* 1277. *Fenna* v. *Evans*, 1 *T. R.* 267.

14. Anonymous.

[Paſch. 5 Ann. B. R.]

IN the caſe of the king there need not be any *ſcire facias* after the year.

Service and Suit.

Vide Co. Lit. 70, 83, and 107. 3 Lev. 21. 4 Co. 8, 9, &c.

Tomkins *verſus* Crocker.

[Paſch. 2 Ann. B. R. 2 Ld. Raym. 860. S. C. with other points.]

Service by doing ſuit to the court of a manor twice a year. Carth. 520. Same names. Cafes B. R. 369. Holt 452. 2 Lutw. 1211. N. L. 380. Lex Man. Ap. 67.

IN *replevin*, the defendant made conuſance for fealty, rent, and ſuit of court, and the ſuit of court was laid to be ſuit to the court of a manor twice a year. The plaintiff confeſſing a tenure by fealty and rent, traverſed the tenure by fealty and rent, and ſuit to the court of the manor twice a year. The jury found there was but one freeholder tenant of the manor, and that time out of mind an ancient court had been held before the ſteward, and that ſeveral freeholders, tenants, did ſuit to it, and that the plaintiff held by the ſervice of doing ſuit *ad cur. man. præd. bis in anno apud man. præd.* Mr. *Raymond* objected, that the court found by the jury is not the court claimed by the conuſance; for *curia manerii* is the court-baron, which is incident of common right, and therefore no title need be made for it, nay it cannot be preſcribed for; whereas this court here found is a ſpecial cuſtomary court, for which he ought to make title in his conuſance, and not a *curia manerii*. *Vide* 1 *Inſt.* 58. 2 *Inſt.* 99. 1 *Inſt.* 268. *Noy* 20. *Et per Holt*, C. J. and *Powell*, J. As a court of pie-powders may be to hold plea of things out of the market, and yet is a court of pie-powders; ſo may a court of a manor be more than a court for ſuitors every three weeks, and yet be a court of a manor: There may be a manor court to be held before the ſteward *bis in anno*. *Vide* 1 *Leon.* 316. And it is to inquire of arrearages of rents and ſervices: And the ſuit to ſuch court ſhall be intended by reſervation before the ſtatute of *quia emptores terr.* *Vide* 12 *H.* 7. 18. One that is not reſiant may be bound to do ſuit real; for it ſhall be intended a ſuit-ſervice reſerved on creating the tenure: And the Court held in the principal caſe, that the ſuit ſet forth in the conuſance was expreſsly found by the ſpecial verdict (*a*).

(*a*) It appears by the report in the iſſue for the defendant *in totidem* Lord *Raymond*, that the jury found *verbis*.

Seſſions General and Quarter.

Vide ante 470, 474, 475, 476, 477, 479, 480, 482, 490, 491, 494. 5 Mod. 329. 2 Hawk. P. C. cap. 8. and Burrow's Seſſions Caſes.

1. The *Caſe of the Pariſh of* King-Langley.

[Trin. 11 Will. 3. B. R. 1 Ld. Raym. 481. S. C.]

Appeal may be adjourned from one quarter-ſeſſions to another. Vide ante 494. Poſt 606, 608. S. C. Caſes B. R. 260. Set. and Rem. 120, 114.

A Motion was made to quaſh an order of ſeſſions, becauſe the juſtices had adjourned the appeal from one ſeſſions to another, and ſo the determination upon the appeal was not at the next quarter-ſeſſions: *Sed non allocatur*: for the appeal muſt be lodged at the next quarter-ſeſſions; yet when it is lodged, the juſtices may adjourn it. *Per Cur.*

2. *Inter* The Pariſhes of Lingfield *and* Battle.

[Paſch. 1 Ann. B. R.]

Seſſions cannot be entered as ſitting three days together. Ante 494. Poſt 606, 608. S. C. Set. and Rem. 143.

CAPTION of an indictment of ſeſſions was, *ſeſſio tent. viceſimo & viceſimo octavo die Julii, &c. Et per Holt*, C. J. It is naught, for though a ſeſſions may adjourn from one day to another, and ſo ſit by adjournment, yet it muſt not appear in a lump, as ſitting three days together, but diſtinctly.

3. Domina Regina *verſus* Savin.

[Paſch. 2 Ann. B. R. 2 Ld. Raym. 871. S. C.]

Seſſions cannot make an order to proſecute an offender out of the county-ſtock.

AN order of ſeſſions was made, that the clerk of the peace ſhould proſecute an indictment of barretry found againſt *J. S.*, and that the charge be allowed out of the county-ſtock. *Note:* By 43 *Eliz. c.* 2., the juſtices have power to diſpoſe of the ſurplus to charitable uſes; upon which clauſe it was offered to maintain this order: But the Court ſaid this was not to take place out of the ſurplus, but out of the original ſtock; beſides, a gift of lands to raiſe money to proſecute offenders, would not be good as a charitable uſe (*a*).

(*a*) Particular proviſion is made for the expence of proſecution in caſes of felony by 25 *G.* 2. *c.* 36. 27 *G.* 2. *c.* 3. 18 *G.* 3. *c.* 19. but there is no general proviſion for the proſecution of inferior offences. By ſtat. 12 *G.* 2. *c.* 29. *ſ.* 6. the treaſurers of counties are directed to pay the money raiſed by county

county rates, according to the direction of the general quarter-ſeſſions for the purpoſes in the acts there recited, and for any other uſes or purpoſes to which the public ſtock of any county, &c. is or ſhall be applicable by law. Upon which it has been ruled, that the quarter-ſeſſions may order a ſum of money to be paid for conteſting the legality of a fine impoſed on the county, *Rex* v. *Inhabitants of Eſſex*, 4 *T. R.* 591.

4. Anonymous. [606]

[Mich. 2 Ann. B. R.]

WHEN a ſtatute gives a penalty to be recovered before juſtices of peace, and preſcribes no method, it ought to be by bill. *Per Holt*, C. J.

5. *Inter* The Inhabitants of St. Andrew's Holborn *and* St. Clement Danes.

[Mich. 3 Ann. B. R.]

Seſſions may alter and ſet aſide their own orders the ſame ſeſſions. Ante 494, 605. Poſt 608. 5 Mod. 396, 417. S. C. 6 Mod. 287.

UPON a *certiorari* the following orders were removed into *B. R.* 1ſt, An order made at the general quarter-ſeſſions of *Middleſex*, 1704, which recited an appeal made at the general ſeſſions of the peace for the ſame county in *September* 1704, by the pariſh of *St. Clement Danes*, againſt an order of two juſtices, to remove one *Mary Gear* from *St. Andrew's Holborn* to *St. Clement Danes*, as the place of her laſt legal ſettlement; and that it was thereupon ordered, that the ſaid appeal ſhould be determined ſuch a day this ſeſſions, and that the churchwardens, &c. of *St. Andrew's Holborn* ſhould then attend, and then went on and ordered, That foraſmuch as it appeared to the Court upon oath, that a copy of the ſaid recited order was ſerved upon the churchwardens, &c. of *St. Andrew's Holborn*; and for that the churchwardens, &c. of *St. Andrew's Holborn* had neglected to attend, the Court allows the appeal. 2dly, An order which recited, That whereas the churchwardens, &c. of *St. Andrew's Holborn*, had then paid in open court to the churchwardens of *St. Clement Danes* 40 *s.* coſts allowed to them, becauſe the churchwardens of *St. Andrew's Holborn* neglected to attend, upon which the appeal was allowed, and the order of the two juſtices vacated; and then ordered, that for good reaſons ſhewn unto this Court, it is ordered, that the ſaid recited order of this Court made on *Monday* laſt, be vacated and diſcharged, and that the ſaid appeal be reheard. 3dly, An order ſetting forth, That upon hearing the appeal of *St. Clement Danes*, it not appearing that *Mary Gear* hath any legal ſettlement in *St. Andrew's Holborn*, or elſewhere,

ſave in *St. Clement Danes*; this Court doth diſmiſs the ſaid appeal, confirm the order of the two juſtices, and order the ſaid *Mary Gear* to be continued in *St. Clement Danes*. Mr. *Darnel* moved to quaſh the ſecond and third orders; he argued, that the hands of the Court were tied up by the firſt order of ſeſſions; *ſed tota curia contra*, and *Holt*, C. J. That during the ſeſſions, the order was in the breaſt of the Court; and though it was drawn up, yet it was ſo [607] far in the breaſt and power of the Court, that by the ſecond order it ceaſed to be a record. The Court at the *Old Bailey* have altered and ſet aſide their judgments ten times the ſame ſeſſions; where judgment *de pain fort & dure* has been given, the Court have after let him in to plead, and after upon his trial he has been convicted, and has had another judgment againſt him to be hanged. So it is of judgments here; which during the ſame term are in the breaſt of the judges; but then, he ſaid, they ought to ſet the firſt order wholly aſide, and have entered up the third order as the only order; for the effect of the Court's ſetting aſide of the firſt order is, that it ceaſes to be an order, and conſequently ought not to be returned to us as an order vacated by another order, but it ſhould have been annulled and made nothing; as in this Court we cannot enter up one judgment upon record, and then enter a *vacat* of that, and then enter a contrary one: The ſeſſions as well as the term is but one day in law. But the matter was referred to the three *puiſne* judges; *& ſic quievit.*

1 Cro. 341. 1 Jo. 330. 3 Cro. 350, 351.

6. The Caſe of Foxham Tithing *in Com.* Wilts.

[Hill. 3 Ann. B. R.]

Order of ſeſſions quaſhed, becauſe it concerned one of the juſtices named in the ſtile of court. S. C. Sett. and Rem. 171. Holt 517.

A Juſtice of peace was ſurveyor of the highway, and a matter which concerned his office coming in queſtion at the ſeſſions, he joined in making the order, and his name was put in the caption. *Et per Holt*, C. J. It ought not to be; as if an action be brought by the Chief Juſtice of the Common Pleas in the Court of Common Pleas, the *placita* muſt be *coram Ed'ro Nevill Mil. & Sociis ſuis*, and not *coram Thoma Trevor*, &c. And it was quaſhed.

7. *Inter* The Inhabitants of the Pariſhes of South Cadbury *and* Braddon *in Com.* Somerſet.

[Mich. 9 Ann. B. R.]

ON an appeal to the ſeſſions the Court diſcharged the firſt order, and now Mr. *Earl* moved to ſet aſide the order of diſcharge, becauſe the juſtices do not ſay whether they diſcharge it for form, or on the merits; for if it was for form, the pariſh is not bound; but if on the merits, the pariſh in conſequence is hereby diſcharged for ever. *Et per Cur.* 1ſt, The juſtices are not bound to expreſs the reaſon of their judgment in the judgment, no more than other courts; and if it was otherwiſe held in the late Chief Juſtice's time, it paſt without due conſideration. The reaſon of their judgment muſt be collected from the record; as where judgment is arreſted upon an inſufficient indictment.

The ſeſſions need not ſet forth the reaſon of their judgment. S. C. Sett. and Rem. 172.

* If the ſeſſions reverſe the firſt order, and that being removed appears to be good, this Court muſt intend it was reverſed on the merits, and affirm the order of ſeſſions.

Orders reverſed, ante 472, 486, 492, 494. 6 Mod. 287.

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If the ſeſſions reverſe the firſt order, and that being removed, appears not to be good, we muſt intend it was reverſed for form, and affirm the order of reverſal.

So if the ſeſſions affirm the firſt order, and that appears to be good, we muſt affirm the order of ſeſſions.

But if the firſt order appears bad, and the ſeſſions affirm it, this Court muſt reverſe it, becauſe it appears naught.

Sheriffs.

Dominus Rex *verſus* Daws.

Vide 10 Co 99, 100. 1 Salk. 99, 175.

[Hill. 13 Will. 3. B. R. 1 Ld. Raym. 722. S. C.]

DAWS was taken upon an attachment for a contempt *die veneris prox. poſt Craſtin. Sanctæ Trin.* and the ſheriff took a bail-bond for his appearance, and ſuffered him to be at large. *Daws* would not appear, the ſheriff was amerced. The proſecutor refuſed to accept the aſſignment of the bail-bond; and *Raymond* moved, that farther amer-

Sheriff may take bail-bond on an attachment of contempt, but the proſecutor may refuſe to accept it. Mod. Caſ. 122. S. C. Caſes B. R. 579.

amerciament might be ſtayed, and that the proſecutor might accept of the bail-bond, which was but in 40 *l.* and the proſecutor thought it too little. He urged, the ſheriff was bound by the ſtatute to bail and ſet him at large, and cannot ſeize him after the return; he has done all he can, and ought not to be amerced for not doing more than he can. No action lies againſt him in ſuch caſe, there ought for the ſame reaſon to be no amercement. The Court agreed, that a bail-bond may be taken on an attachment, but ſaid they could not oblige the plaintiff to accept the bail-bond, it might be inſufficient; if it was, the ſheriff might thank himſelf; if it be ſufficient, he may by ſuing the bail-bond, reimburſe himſelf (*a*).

(*a*) In *Field* v. *Workhouſe*, *Com.* 264. the defendant pleaded it was taken by the ſheriff on an attachment for contempt of *C. B.* and void by the ſtat. 23 *Hen.* 6., and had judgment. *King*, Ch. J. ſaid, that upon an attachment of privilege, attachment upon a prohibition, or *attachments in proceſs* upon a penal ſtatute, the ſheriff might take bail, but not upon an attachment for a contempt. In *Say* v. *Ellis*, 2 *Bl. Rep.* 965. it appearing on oyer of a bond that the condition was to anſwer a contempt in the Court of Chancery, the defendant demurred; the Court thought if there was any ground of exception he ſhould have pleaded facts ſufficient to bring the queſtion before the Court, and gave him leave to plead, and judgment was afterwards ſigned for want of a plea. In *Studd* v. *Acton*, 1 *Hen. Bl.* 468. it was ruled on demurrer that an action cannot be maintained againſt a ſheriff for refuſing to take bail upon an attachment out of Chancery for a contempt. The Court did not give an opinion whether the ſheriff has a right to take bail. *Vide Danby* v. *Lawſon*, *Prec. Ch.* 110. *Eq. Ab.* 350. *Bland* v. *Riccard*, 3 *Leon.* 208. *Anon. Str.* 479. 1 *Vent.* 231. 2 *Vent.* 238.

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See 2 Inſt. 301. 2 Leon. Caſ. 114. 3 Co. 13. Vaugh. 169, 170, 373. Ray. 54, 191, 355, 356.

Statutes in General, and the Expoſition thereof.

1. Rex & Regina *verſus* Barlow.

[5 W. & M. B. R.]

Where a ſtatute directs a thing of a public nature, *may* is underſtood as *ſhall*. Q. Cro. Jac. 134. Cro. El. 655. 2 Inſt. 118. Comb. 220. S. C.

INDICTMENT on 14 *Car.* 2. *c.* 12. againſt churchwardens and overſeers, for not making a rate to reimburſe the conſtables. Exception was taken, that the ſtatute only puts it in their power to do ſo by the word *may*, &c. but does not require the doing of it as a duty, for the omiſſion of which they are puniſhable. *Sed non allocatur*; for where a ſtatute directs the doing of a thing for the

the ſake of juſtice or the public good, the word *may* is the ſame as the word *ſhall*; thus 23 *H.* 6. ſays, the ſheriff may take bail; this is conſtrued, he *ſhall*; for he is compellable ſo to do. Carth. 293. Skin. 370. Set. and Rem. 212.

2. Bennet *verſus* Talbot. Hill. 8 Will. 3. B. R. *Vide* title *Declaration*, pl. 2. pag. 212.

3. Mills *verſus* Wilkins.

[Hill. 2 Ann. B. R.]

S. C. 6 Mod. 62. 3 Salk. 331. Holt 662. 2 Hawk. P. C. 247.

TRESPASS for taking ſeveral ſkins from the plaintiff. The defendant, as an officer, juſtified on 1 *Jac.* 2. *cap.* 22. about tanning, and ſet forth the title of the act, miſtaking a word, by which it varied from the true title, and averred the ſkins were not dreſſed according to the intent of the ſtatute; to which it was demurred, becauſe no ſuch act as is here ſet forth. *Vide Cro. Car.* 232. 3 *Keb.* 648. On the other ſide it was anſwered, that the title is no part of the act; that old ſtatutes have no title, and the opinion of *Hale*, C. Baron, was cited. *Hard.* 324. *Vide Hut.* 56. *Hob.* 310. 11 *Co.* 33. 4 *Inſt.* 345. *Holt*, C. J. The title is not a material part, neither is it neceſſary to ſet it forth; but yet it is a name given by the makers, and therefore you muſt deſcribe it accordingly if you will deſcribe it by its title; and they denied the opinion of my Lord *Hale*, ſaying, it was a ſudden opinion. Judgment for the plaintiff (*a*).

Title no part of ſtatute, but if ſet out wrong, is fatal. Vide 4 Co. 48. Cro. Car. 232. 1 Jon. 50. Cro. Jac. 140. Ray. 191, 192. Hard. 324. 3 Cro. 186. Saund. 128. 3 Keb. 461, 642, 648. Dyer 324. Hob. 310.

(*a*) It may perhaps appear, that the rule by which a miſrecital of the title, commencement, or proviſions of an act of parliament, which it was unneceſſary to ſtate, is fatal, ſhould be confined to thoſe caſes where the reſt of the pleading is ſo connected by reference with the act deſcribed as to be imperfect without ſuch deſcription; and the deſcription being falſe, the allegation, of which by reference it forms a material part, cannot be true. But that where the plea is, independent of the recital, perfect and ſufficient, a variance in the merely ſuperfluous recital will not be material. Thus, in the report of this caſe, 6 *Mod.* 62. *Holt*, Ch. Juſ. ſaid, "You tie your juſtification to an act ſo entitled, and if you cannot produce one you are gone." So in *Boyce* v. *Whitaker*, *Doug.* 94. the defendant having ſtated with ſome variance the ſtat. 23 *H.* 6. *c.* 9. relative to ſheriffs bonds, and pleaded that the bond whereon he was ſued was taken againſt the form of the *ſtatute aforeſaid*, the plea was held bad becauſe the word *aforeſaid* tied the party up to an exact recital. In *Lutw.* 140. it is held that if there is a material variance from a general ſtatute, if the declaration conclude *cont. form. ſtat. in ejuſm. caſ. edit.* and not *contra form. ſtat. præd.* it is well. So in *Wendham* v. *Palgrave*, *Fort.* 372. *Str.* 214. the declaration recited that by a ſtatute made in a parliament held the 8th day of *Jul.* 8th *Ann.* it was enacted, *&c.* when no ſuch parliament was held, and concluded generally *cont. form. ſtat. ejuſmod. &c.* the Court held that it was well enough; but contrary to the ſta-

tute aforeſaid would tie it up. Accordingly in 2 *Hawk.* ch. 25. ſ. 104. it is ſaid, "It ſeems to be agreed that not only a miſrecital of the day whereon the parliament was holden, but even a miſrecital of the purview of a ſtatute, may be ſalved by a general concluſion *contra form. ſtat.* without adding *prædict.*" The caſe, therefore, ſeems to ſtand upon the ſame foundation as every other where there is an error in an immaterial allegation, *viz.* that if the allegation is ſo connected with what it is material to aver, that the latter is ſolely referable to it, and would be defective and imperfect without it, the error is fatal, but otherwiſe not. As to which, *vide Savage* v. *Smith*, 2 *Bl. Rep.* 1101. *Briſtow* v. *Wright*, *Doug.* 664. *Gwinnett* v. *Phillips*, 3 *T. R.* 643. and particularly *Peppin* v. *Solomons*, 5 *T. R.* 496.

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[610] Statutes, and the Expoſition thereof.

S. C. 1 Show. 241, 266.

1. Hobbs qui tam *verſus* Young.

[Trin. 3 W. & M. B. R. Intr. Hill. 1 W. & M. Rot. 129.]

Exerciſing a trade by others is within the ſtat. 5 Eliz. Vide poſt pl. 2, 3, & 7. 3 Mod. 313. S. C. Carth. 162. Comb. 179. Shower 266. 11 Co. 53. b. Cro. Car. 347, 516, 517. 6 Mod. 22. Cro. Car. 516, 517. 1 Saund. 10. 1 Rol. R. 10. Hob. 211. 2 Bulſt 187. 2 Cro. 347, 349, 516. 8 Rep. 130. 11 Rep. 54. 1 Sid. 303. Cro. El. 872. Holt 66. 2 Ld. Raym. 1179.

Vide Raynard v. Chace, 1 Bur. 2.

DEBT on 5 *Eliz.* for uſing the trade of a clothworker, not being brought up an apprentice; upon *nil debet* the jury found, that the defendant was a *Turkey merchant*, and exported woollen manufacture into *Turkey*, and that he employed clothiers that had ſerved apprenticeſhip to work the clothes in his own houſe, at his own charge, and with his own materials, which he ſent into *Turkey* as merchandize, but that the defendant never ſerved an apprenticeſhip. *Per Cur.* 1ſt, The defendant is the trader in this caſe, and the perſon that exerciſes the trade, becauſe he employs the reſt, who work but as his ſervants, and the loſs and gain is to be his.

2dly, This is a trading within the ſtatute; becauſe the cloth is not confined to the uſe of his own family, but vended out for the ſake of commerce; and whether the utterage be in *England* or in *Turkey*, is not material.

3dly, That he that hath not ſerved an apprenticeſhip is by this ſtatute reſtrained to work as a trader, *either by himſelf or others*; for the intent of this act is to annex the benefit of trade to ſuch as underwent the hardſhip of learning it, thereby to encourage labour in youth. And few would undergo the trouble of being apprentices, if they might employ others to work for them.

4thly, This is a negative ſtatute, and no one ſhall exerciſe a trade againſt it, unleſs by virtue of a cuſtom, as the

the widows of tradeſmen, who by cuſtom carry on the trade of their huſbands, which the Court held not within the ſtatute. *Hutt.* 132. *Noy* 5. 1 *Saund.* 312. 2 *Bulſt.* 191. *Cro. Car.* 516.

2. Dominus Rex *verſus* Paris Slaughter. [611]

[Hill. 11 Will. 3. B. R. 1 Ld. Raym. 513. S.C.]

Indictment for exerciſing the trade of a fellmonger contrary to 5 Eliz. not quaſhed, becauſe averred to be a trade at the time of making the act. Vide pl. 1, and 7. S.C. Holt 68. Caſes B. R. 311. 2 Ld. Raym. 1179.

BRODERICK moved to quaſh an indictment on 5 *Eliz. c.* 4. for uſing the trade of a fellmonger, not having been an apprentice ſeven years; he urged, that this was a buſineſs required no ſkill, for it was only to pull the wool from the ſkin. He cited 1 *Cro.* 499. Information for exerciſing the trade of a hemp-dreſſer reverſed. One *Paſch.* 4 *Jac.* 2. for exerciſing the trade of a woolcomber, quaſhed. Of a pippin-monger reverſed. *Sed per Holt*, C. J. If in the indictment it be averred to be a trade (*a*) at the time of making the ſtatute, we will not quaſh it; for whether it was a trade then or no, or whether any ſkill be requiſite to the exerciſe of it, is matter of fact proper for the trial of a jury: And there are many trades within the general words and equity of that act, beſides thoſe that are mentioned therein. The caſe of a coſtermonger is not yet determined, and the caſe of an upholſter, 2 *Bulſt.* 186., is not law. The Court would not quaſh it.

(*a*) If a trade is mentioned in the ſtatute, it is not neceſſary to allege that it was uſed at that time; 4 *Mod.* 145. *Rex* v. *Thoms*, *Bull. N. P.* 192.; otherwiſe it muſt be averred to be a trade uſed within the realm of *England* or *Wales* at the time of making the act, *ibid.* *Infra hoc regnum* is not ſufficient, for that extends to *Scotland*; and averring the trade to be uſed in *Scotland* would ſignify nothing; *Rex* v. *Liſter*, *Str.* 788. *Barnard. B. R.* 30.

3. Domina Regina *verſus* Harper.

[Trin. 4 Ann. B. R. 2 Ld. Raym. 1188. S.C.]

Where the trade is averred to be a trade at the time of the act, the Court cannot intend it not within it.

INDICTMENT for uſing the trade of a merchant-taylor contrary to the ſtatute 5 *Eliz.* Serjeant *Broderick* moved to quaſh it, becauſe it is not a trade within the ſtatute. Quaſhed *niſi*. Some days after Mr. *Eyre* moved to quaſh an indictment againſt *Corniſh*, for uſing the trade of a ſeamſtreſs, not having ſerved as an apprentice; and the Court refuſed, becauſe it was ſet forth in the indictment to be a trade in *England* at the time of making the act; wherein the words are, *any craft, myſtery, or occupation now uſed.* So that if this trade of a ſeamſtreſs be not

within the act, the defendant would have the advantage of it upon the trial. But as to *Harper's* caſe, which Mr. *Eyre* put them in mind of, the Court ſeemed to think a merchant-taylor was nonſenſe and unintelligible; they did not know what a merchant-taylor meant, and ſo it differed. It is a good exception that it is not averred in the indictment, that the trade therein mentioned was a trade at the time of making the ſtatute. *Domina Regina* verſus *Corniſh*, *eodem termino*.

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4. Billings *verſus* Eads.

[Mich. 4 Ann. B. R. 2 Ld. Raym. 1214. S. C.]

H. may let coach-horſes and coachman without a licence.

TRESPASS and ſpecial verdict found; the caſe was, a gentleman had a coach and harneſs of his own, and gave an inn-holder 100*l. per annum* to find him a pair of horſes and a coachman: And the queſtion was, Whether he could do this without a licenſe to keep a hackney-coach, upon 5 & 6 *W. & M. c.* 22. *Et per Cur.* Though in the beginning of the licenſing clauſe, *ſect.* 3. and in the prohibiting clauſe, *ſect.* 5. hackney-coach or coach-horſes are mentioned in the disjunctive, yet that muſt be underſtood of coach-horſes to be uſed with a hackney-coach, becauſe all other proviſions in the act, *viz.* the number, the fine, the rent, and the whole revenue reſerved, is confined to hackney-coaches; and the party cannot forfeit, but where the commiſſioners may licenſe; and it is an act of reſtraint.

5. Anonymous.

[Mich. 4 Will. 3. B. R.]

Conſtruction of the ſtamp act.

A Warrant of attorney for entering up a judgment was written upon a paper, which likewiſe contained a bond, and had only one ſtamp, whereas by the act concerning ſtamp-duties it ought to have two ſtamps: Judgment was entered up by virtue of this warrant. And now it was moved, that the judgment and execution might be ſet aſide for this cauſe. *Sed per Cur.* There may be reaſon to refuſe ſuch a warrant of attorney in evidence, but no reaſon to make all void; for there is nothing in the act that imports that.

6. Dunn qui tam *verſus* Hinchdy.

[Paſch. 5 Ann. B. R. 2 Ld. Raym. 1275. S. C.]

DEBT upon the ſtatute 10 *W.* 3. *c.* 2. for twelve dozen of buttons, made *de ligno tantum* in imitation of, *&c.* The jury found the buttons were all wood but the ſhanks, which were braſs, and that they were made in imitation, *&c.*, and that there were buttons made *de ligno tantum*, *&c.* *Weld* ſaid, that now it appeared the ſtatute was applicable, and might have its effect upon other buttons, and that a penal law was to be conſtrued ſtrictly, and not by intendment. *Vide* 2 *Inſt.* 199. *Plo.* 47. *a.* But the Court reſolved they were prohibited by the act; for the ſhank is no part of the button, but added to faſten it: And if buttons thus made in imitation, *&c.*, by having a braſs ſhank added, ſhould be out of the act, it would be in every body's power to evade it. Adjudged.

Debt ſur ſtat. 10 W. 3. c. 2. Vide 3 Lev. 2, 3. 374.

7. Domina Regina *verſus* Maddox. [613]

[Paſch. 5 Ann. B. R.]

PER *Cur.* Upon indictments on the ſtatute 5 *Eliz.* in evidence we allow following the trade for ſeven years to be ſufficient without any binding, this being a hard law (*a*). Cited in Regina *verſus* Franklin, 2 Ld. Raym. 1179.

Expoſition of 5 Eliz. Vide ante pl. 1, 2, and 3. Cumb. 251, 255.

(*a*) *R. ac. French* v. *Adams*, 2 *Wilſ.* 168. *Wallen* v. *Holton*, 1 *Bl.* 233. A wife who has aſſiſted her huſband ſeven years, or a perſon who has ſerved ſeven years as a journeyman, may exerciſe the trade; *Show.* 242. 3 *Keb.* 400. 12 *Mod.* 401. 10 *Mod.* 70. A perſon may exerciſe any number of trades in which he has been employed ſeven years; *French* v. *Adams*. *R.* 4 *Leon.* 9. a that a perſon who has ſerved an apprenticeſhip to any trade within the ſtatute may follow any other trade within it; *S. P. Keble* 473. *Vide Bull. N. P.* 192.

Statutes of Hue and Cry.

Stat. of Winton, 13 E. 1. c. 12. and 27 El. c. 13. Vid. Hale's P. C. 71, 72. 3 Inſt. 68. Dalt. c. 100. Staund. P.C. 27. 1 And. 116. 2 Sid. 44. 1 Sid. 139. 1 Leon. 323.

1. Aſcomb *verſus* The Hundred of Spelholm.

[Mich. 2 W. & M. B. R. Intr. Hill. ult. Rot. 901.]

S. C. 1 Show. 94, 241. 3 Mod. 287. S. C. called Aſhcomb verſus the Hundred of Elthorn. Carth. 145. Holt 637.

H. robbed, refuſing to take the oath, cannot ſue. Vide poſt pl. 3. 7 Co. 6, 7. Servant robbed of his maſter's goods, maſter may ſue. Vide infra, & ante 440, 441. 2 Saund. 380. S.C. Carth. 145. called Aſhcomb verſus the Hundred of Elthorn.

AN action was brought by the maſter for the robbery of *A.* and *B.* his ſervants. The jury found the ſpecial matter, and that *B.* was a Quaker and would not take the oath (*a*), *viz.* that he knew none of the robbers. *Et per Cur.* 1ſt, The maſter may ſue for the robbery of his ſervant, and the oath of the ſervant is ſufficient. 2dly, The ſervant may alſo ſue, for he had the poſſeſſion. 3dly, If the ſervant be robbed in the preſence of the maſter, the maſter muſt ſue, and the oath of the maſter is ſufficient. *Sty.* 156. But if the ſervant was robbed out of the maſter's preſence, the ſervant muſt ſwear. 4thly, As to *B.*, who refuſed to ſwear, the hundred is not liable; for the ſtatute of *Eliz.* was made in favour of the hundred to prevent confederacy and combination between the thieves and the party robbed, and it was the maſter's folly to employ ſuch a ſervant.

(*a*) By ſtat. 7 and 8 *Will.* 3. c. 34. a Quaker's affirmation is of the ſame effect as an oath, except in criminal caſes. The exception has been ruled to extend to an appeal for murder, *Caſtle* v. *Bambridge*, 2 *Str.* 854.;—a motion for an attachment for non-performance of an award, *Robins* v. *Sayward*, 1 *Str.* 441.;—a motion for an information for a miſdemeanor, *Rex* v. *Wych*, 2 *Str.* 872.;—articles of the peace, *Rex* v. *Green*, 1 *Str.* 527.;—a rule to anſwer the matter of an affidavit, 2 *Str.* 496.;—an affidavit in defence of another againſt a rule for an information, but not in his own defence, *Rex* v. *Gardiner*, 2 *Bur.* 1117. It does not extend to affidavits concerning the appointment of overſeers, *Rex* v. *Tanner*, 2 *Str.* 1219.; or to penal actions, *Atchiſon* v. *Everett*, *Cowp.* 382. *Vide Eſpinaſſe* 728.

Vide Style's Rep. 156. &c. ſupra. 1 Brownl. 155. 2 Leon. 82.

2. Combs *verſus* The Hundred of Bradley.

[Paſch. 5 & 6 W. & M. B. R.]

Servant robbed of his maſter's money may have an action againſt

IN an action againſt the hundred, the plaintiff declared, that he was poſſeſſed *ut de bonis ſuis propriis, &c.* The jury found the plaintiff was a ſervant, and was robbed upon the

the road of 30 *l.* of his maſter's money, and 20 *s.* of his own. *Et per Cur.* The action well lies by the ſervant, for the money is his, and he is poſſeſſed *ut de bonis propriis* againſt all, and in reſpect of all but him that hath the very right. If a ſervant be robbed of his maſter's goods, he may maintain an appeal of robbery.

the hundred. S. C. 4 Mod. 333. Comb. 263. Holt 37. Caſes B. R. 54. Comb. 263. 4 Mod. 303. Latch. 127.

3. Dowly *verſus* The Hundred of Odium.

Vide 1 Show. 60.

[Mich. 6 Will. 3. B. R.]

IN an action upon the ſtatute of hue and cry, a verdict was for the plaintiff; and Mr. *Clark* moved in arreſt of judgment, that it appeared the oath was taken before a juſtice of peace of the county, and not a juſtice inhabiting within the hundred, according to 27 *Eliz.* But the Court held it good notwithſtanding that, for the ſtatute of *Winton* ſays no ſuch thing, and 27 *Eliz.* does it only by way of direction; and the declaration had been good, though it had not ſhewn an oath taken before any juſtice at all.

Declaration need not ſet forth the oath to be taken before a juſtice of peace of the hundred. Vide ant. pl. 1. 7 Co. 6, 7. Noy 155. 2 Vent. 215. 2 Saund. 423. 3 Saik. 184. Andr. 115.

4. Cowper *verſus* The Hundred of Baſingſtoke.

[Hill. 1 Ann. B. R. 2 Ld. Raym. 826. S. C.]

IN *debt on the ſtatute of hue and cry*, a ſpecial verdict was found, that the plaintiff was travelling in the highway in the hundred of *Michael-River*, where he was ſet upon and carried into the hundred of *Baſingſtoke*, and robbed in a coppice in the highway of this hundred. The queſtion was, Which hundred ſhould be liable? And it was adjudged, that the hundred of *Baſingſtoke* ſhould, for there the robbery was committed, and not before; and if theſe had been two counties, it is certain the indictment of robbery muſt have been brought in the latter where the goods were taken, and not in the firſt where the aſſault was made: Alſo the hundred is not liable for not preventing the robbery, but for not taking the robbers; for if they are taken, the hundred is excuſed. *Vide Hutt.* 125. *Goldſb.* 86. It was objected, that the taking, *&c.* ſhould relate to the aſſault, and ſo it was a robbery *ab initio*, like the caſe of murder, where it is certain there ſhall be a relation to the ſtroke, which was the cauſe. In anſwer to which the Court took this diverſity. As to forfeitures there ſhall be a relation to the firſt cauſe; ſo if there be a pardon of the ſtroke, it ſhall diſcharge the murder; but after the ſtroke, if one knowing thereof receives him, or if a conſtable arreſts him and lets him go, the receiver is not

Aſſault in the hundred of A., and goods taken in B., B. is chargeable. See 2 Cro. 675. March 11. Noy 52, 155. 1 Leon. pl. 72. 1 Sid. 263, 367. 4 Co. 41, 42, 47. 5 Co. 2. pl. 39. 1 Co. 99. Hale's P. C. 54. S. C. Far. 157. Rep. A. Q. 8. Holt 638. How murder has relation to the ſtroke. 1 Hawk. 79, 80. 2 Hawk. 180, 181, 320. 1 Show. 60. 3 Salk. 184. 3 Mod. 258, 287. 5 Mod. 150, 160, 263. 2 Saund. 379, 380, 423. 4 Mod. 383.

not acceſſary to felony, nor the conſtable a felon; for it is not a felony till death enſue. 11 *H.* 4. 12. *b.* Otherwiſe as to collateral purpoſes; for if the ſtroke and death are laid at different days, and the indictment concludes, *et ſic murdravit die & loco* of the ſtroke, it is naught; but the day and place of his dying is well. 4 *Co.* 41. *Plowd.* 401. But here the aſſault is not a neceſſary efficient cauſe of the robbery, as a ſtroke in murder is; therefore there is no relation in this caſe, becauſe no neceſſity. It was objected, that if one be taken in the hundred of *A.* and carried into the hundred of *B.* into a houſe there, *viz.* a manſion-houſe, and robbed, or taken in the day-time in *A.* and carried to *B.*, and there robbed in the night, there ſhall be no remedy. And the Court ſaid, thoſe caſes were not provided for by the ſtatute. Adjudged *per Holt & totam Cur.* Alſo he ſaid as to the aſſault's being in the coppice, that it was not neceſſary the robbery ſhould be in the highway to charge the hundred. *And yet ſee Cro. Car.* 267., *where it is ſaid, that the inhabitants are not bound to keep watch in a new highway, or to make amends for a robbery therein committed.*

Vide S. P. 1 Show. 60. Comb. 160. 3 Goldſb. 155, 156. 2 Goldſb. 280. P. C. 1 Hawk. 202. Cro. Car. 267.

Who chargeable to the hundred on a hue and cry, vide 2 *Saund.* 423.

Subſidies, Taxes, and Cuſtoms.

1. Brewſter *verſus* Kitchel.

[Hill. 9 Will. 3. B. R. *Vide* the ſtate and reſolution of this caſe, title *Covenant*, pl. 4. pag. 198.]

Taxes in general means parliamentary. 5 Mod. 368. S. C. Comb. 424, 466. S. C. 1 Salk. 158. S. C. S. C. Carth. 438. 3 Salk. 310. Caſes B. R. 166. Holt 175, 669.

IN the debate of this caſe it was laid down by *Holt*, C. J. That the word *taxes*, generally ſpoken with reference to a freehold, or where the ſubject matter will bear it, ſhall be intended parliamentary taxes *propter excellentiam.* 34 *H.* 8. *Quinzim.* 9. But there be other taxes not parliamentary, as repair of churches, commiſſion of ſewers; for any impoſition which takes away part of his goods or rent, is a tax. 2 *Inſt.* 532.

Different manners of taxing, and when introduced.

The ancient way of taxing was by tenths and fifteenths, then by ſubſidies, after that by royal aids; at laſt by a pound-rate: The former were all on the perſon or perſonal eſtate, and were much the ſame thing; the latter was

was upon rents and lands. Tenths and fifteenths were the moſt ancient. *Vide Spelman verbo Quindecima.* In 8 *Ed.* 3. a valuation was made on all the towns in *England*, and returned into the Exchequer, which became the ſtanding meaſure for taxing. 2 *Inſt.* 76, 77. From this when a tax was given, the officers of the Exchequer could eaſily compute what each town was to be charged with, and what it came to. *Vide* 11 *H.* 4. 35, 36. *Bro. Quinz.* 9.

The firſt ſubſidy was in and by 32 *H.* 8. *cap.* 50. which was a tax upon the perſon for his lands and goods, payable by the party where he lived. This continued till 15 *Car.* 1.

The aſſeſſment or tax, according to a pound-rate, came in 17 *Car.* 1. In theſe aſſeſſments there was a clauſe to empower the tenant to deduct. So it was in 1642, 1644, 1649. And then, and upon this account it was, that in conveyances it came to be provided, that there ſhould be no deduction for taxes.

2. Trowel *verſus* Ellford.

[Trin. 5 Ann. B. R.]

H. may be aſſeſſed to the land-tax either where he dwells or carries on his employment.

TRESPASS againſt the collectors of the land-tax; the caſe was, that the plaintiff lived in *Middleſex*, but exerciſed and followed the buſineſs of a factor in *Smithfield*; and the queſtion was, Whether the commiſſioners of *Middleſex* where he lived, could tax him as living in *Middleſex*, or he ſhould be taxed by the commiſſioners of *London* as following his buſineſs in *Smithfield?* And *Holt*, C. J. held, That the action lay, and that he was not taxable by the commiſſioners of *Middleſex*; for by the very words of the act, he is to be taxed in the place where his office is exerciſed (*a*): *Cæteri Juſtic. contra*, for this is not an office which is local, but an employment which is perſonal, and the perſon is taxable where he lives; and the affirmative words of the act are directory. He is taxable in either place.

(*a*) An exciſeman who executes his office in different places is chargeable where he reſides; and it was ruled that treſpaſs lay for diſtraining for it upon an aſſeſſment elſewhere; *Barrett* v. *Weeks*, *Str.* 417.

3. Robinſon *verſus* Stephens.

[Mich. 8 Ann. In Canc.]

Where there ſhall be deduction for taxes out of annuity, and where not.

IF one covenants to pay an annuity to *J. S.* the covenantor ſhall not deduct for taxes; for the charge is on the perſon of the covenantor, and not the land. So if *H.* having a term for years, deviſes an annuity to *J. S.* and his heirs, there can be no deduction for taxes, for the term for years is no otherwiſe chargeable with it, than as it is part of the perſonal eſtate; for it cannot be ſaid to iſſue out of the term, when in point of duration it may continue much longer. So if *H.* grants an annuity to *J. S.* and afterwards ſecures it out of a real eſtate, there
[617] ſhall be no deduction for taxes; for the ſubſequent ſecurity cannot leſſen the effect of his former grant, which in its creation was tax-free. *Per Cowper*, Lord Chancellor, at his houſe.

4. Paul *verſus* Shaw.

[Hill. 8 Ann. In Cam. Scacc.]

Priſage, an ancient duty on goods, granted away by the crown, is chargeable with other duties charged on the ſame goods while in the grantee's hands. Concerning priſage, vid. Harar. 56, 57, 218, 301, &c. 477. Davis 27.

ASSUMPSIT for 500 *l.* received to the uſe of the plaintiff; on *non aſſumpſit* a ſpecial verdict was found, that King *Charles* I. gave to *J. S.* and his heirs, the duty of priſage of all wines imported, to hold diſcharged of all aids and taxes; and the queſtion was, Whether the grantee ſhould pay tonnage for this upon 9 & 10 *W.* 3.? *Note;* The duty of tonnage was firſt impoſed *per* 12 *Car.* 2. *c.* 4. *viz.* 4 *l.* 10 *s.* on all *French* wine; then comes 1 *Jac.* 2. *c.* 3. and impoſes 8 *l.* *per* tun on *French* wine, with a clauſe, that the grantee of priſage ſhould pay the duty; then comes 7 & 8 *W.* 3. *c.* 20. which impoſes 25 *l.* *per* ton; after that comes 9 & 10 *W.* 3. *c.* 23. which impoſes over and above, a duty of 4 *l.* 10 *s.* to be levied according as it was by 12 *Car.* 2. And it was adjudged in the Exchequer, that the grantee ſhould not pay this duty of tonnage. Upon this error was brought; and it was ſaid for the grantee, that this was an ancient royal revenue, that if the crown now held it, tonnage could not be due, the queen could not pay a duty of tonnage out of her own priſage; that the grantee claimed under the crown, and ought to have the ſame privilege and exemption, the rather becauſe it was granted with this immunity. But *per Trevor*, C. J. and ſeven other judges in the Exchequer-chamber, it was anſwered and reſolved, that immediately on importation, this duty of tonnage attached

taehed upon the wine, and the grantee receives whatever part he takes for priſage charged with the duty; and this muſt be preſumed to be the intent of the law; for it cannot be imagined the law meant to raiſe this duty on the people to enrich a private man, which would be the effect, if he may have his priſage cuſtom-free. And the grantee paid the tonnage impoſed by all former laws.

As to the reaſons on the other ſide, they anſwered, If the priſage had remained in the crown, it could not have paid by reaſon of the unity of poſſeſſion, it being abſurd, that the queen ſhould be chargeable with a duty to herſelf; but this exemption is only perſonal, and the duty revives when priſage comes to a ſubject, who may pay the duty to the crown, as where a parſon leaſes his glebe. And as to the covenants or clauſe of diſcharge in the grant, that could only extend to the tonnage then in being, which he, though king, had himſelf, and not to what he had not, but might be given to his ſucceſſors. And the judgment was reverſed.

N. This judgment of reverſal was affirmed in *Dom. Proc.* 1 *Bro. P. C.* 323.

Surrender.

[618]

Poſt 620, 621.

In the Caſe of Thompſon *and* Leach. Hill. 9 Will. 3. B. R. (Which ſee, title *Remainder*, pl. 2.)

S. C. 3 Lev. 284. 2 Vent. 198, 199, &c. Ante 576, 427, and 569.

THE Court held, that a ſurrender immediately diveſts the eſtate out of the ſurrenderor, and veſts it in the ſurrenderee; for this is a conveyance at common law, to the perfection of which no other act is requiſite, but the bare grant; and though it be true that every grant is a contract, and there muſt be an *actus contra actum*, or a mutual conſent; yet that conſent is implied; a gift imports a benefit, and an *aſſumpſit* to take a benefit may well be preſumed; and there is the ſame reaſon why a ſurrender ſhould veſt the eſtate before notice or agreement, as why a grant of goods ſhould veſt a property, or ſealing of a bond to another in his abſence, ſhould be the obligee's bond

Surrender veſts the eſtate in the ſurrenderee without his expreſs acceptance. 3 Mod. 301, 256. S. C. Caſes in Parl. 150. Show. 206. Co. Lit. 266. b. S. C. Eq. Ab. 178. p. 3. 3 D. 164. p. 13. 3 Salk. 300. 3 Lev. 284. Comb. 438, 468. Carth. 211, 250,

435. Holt 357, 622, 665. Caſes B. R. 475.

bond immediately without notice (*a*). 2 *Vent.* 198. 3 *Levinz* 284. 2 *Shower* 196, 308.

See 3 Lev. 285. *That the judgment in the principal caſe was reverſed in the Houſe of Peers, in* 1692 (*b*).

(*a*) *Vide ante* 301. *Taylor* v. *Horde*, 1 *Bur.* 125.

(*b*) The judgment which was reverſed in 1692 was in a former cauſe between the ſame parties; in which it was ruled in *C. B., Trin.* 2 *W. & M.* 3 *Lev.* 294. 2 *Vent.* 198. and on error in *B. R. Hil.* 3 *W. & M.* 3 *Mod.* 296., that the ſurrender was void for want of acceptance. The reverſal of thoſe deciſions was on the 23d *Dec.* 1692, *Journ. of the Houſe of Lords*, vol. 15th, pa. 163, by which the doctrine in the text was eſtabliſhed. The cauſe which was decided 9 *W.* 3. was relative to the ſame ſurrender, but turned upon a different point; as to which, *vide* the reports *ante* 427, 576.

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Vide ante 570.

Tail.

S.C. 1 Salk. 338. 1 Show. 370. 4 Mod. 1. S.C. Fareſl. 18. Holt 615. Rep. A. Q. 19. 3 D. 198. p. 10, 11.

1. Symonds *verſus* Cadmore. Hill. 4 & 5 W. & M. B. R. Rot. 743. *Vide* this Caſe, title *Fines*, pl. 3. pag. 338.

2. Machil *verſus* Clark.

[Trin. 1 Ann. B. R. Intr. in B. R. Paſch. 12 Will. 3. Rot. 342. 2 Ld. Raym. 778. S. C. Comyns 119. S. C.]

Covenant by tenant in tail to ſtand ſeiſed to the uſe of himſelf for life, remainder to A. in tail, is void; becauſe the remainder is to take effect after his death. 1 Mod. 98, 121, 150, 175. 3 Lev. 126, 306, 307, &c. 2 Lev. 75, 213, 225. 2 Mod. 207. 1 Vent. 372.

TENANT in tail covenanted to ſtand ſeiſed to the uſe of himſelf for life, remainder to *John* his eldeſt ſon in tail, and afterwards ſuffered a common recovery with ſingle voucher, wherein he was tenant to the *præcipe*: And the firſt queſtion was, What operation the covenant had? For if it made any alteration in the eſtate-tail, the recovery did not bar; and if it did not, the recovery and ſingle voucher did bar. The Court held the recovery good, and affirmed the judgment; and *Holt*, C. J. delivered the opinion of the Court, and gave the reaſons for it, the ſum of which was,

7 Mod. 22, 23, 23.

1ſt, That if tenant in tail by covenants to ſtand ſeiſed, or by leaſe and releaſe, or bargain and ſale, conveys to another and his heirs, it is a baſe fee, not determined nor

determinable till the entry of the iſſue; for before the ſtatute *de donis*, he had a fee-ſimple; and the ſtatute does not alter the nature of the eſtate, but reſtrain the power of alienation; and therefore as he might before the ſtatute, ſo he may ſince; the ſtatute only makes it voidable (*a*).

2dly, He has the whole eſtate in him, and therefore muſt be able to diveſt it, and ſo he ſaid was *Seymour's* caſe in point, *viz.* Tenant in tail bargained and ſold, the bargainee has a deſcendible fee. This caſe he held for law, butdenied the caſe of *Took* and *Glaſcow*, 1 *Saund.* 260. and likewiſe *Litt.* § 612. if it be taken literally. Bargainee of tenant in tail has a deſcendible eſtate.

3dly, This appears from 3 *Coke* 84, 613. If tenant in tail grants a rent, advowſon, *&c.* it is not void as to their iſſues, but voidable; for if he brought a *formedon*, the defendant may plead a warranty. *Vide Winch.* 5. *Bridg.* 77. But this is ſtill more apparent from the common caſe, where tenant in tail makes a leaſe not warranted by the ſtatute, it is not void as to the iſſue, but voidable; and tenant in tail may exchange with a tenant in fee, in which caſe a fee is given and taken without livery: *Ergo*, tenant in tail may alſo by covenant to ſtand ſeiſed. If tenant in tail by leaſe and releaſe, by bargain and ſale, or by covenant to ſtand ſeiſed, convey to another and his heirs, the eſtate-tail is not in abeyance, but in the alienees, for the law puts nothing in abeyance, but of neceſſity; and it is not in the tenant in tail; for he cannot bring waſte, *&c.* *Vide Hob.* 339. *Yelv.* 51. 1 *Leon.* 110. 1 *And.* 191. 3 *Cro.* 895. But he held that the preſent conveyance did produce no alteration in the eſtate-tail, becauſe the eſtate in remainder was to commence after his death; and took this difference. What conveyances by tenant in tail are defeaſible by the entry of the iſſue. Co. Litt. 327. b.

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If tenant in tail make a future leaſe for years, which by poſſibility may be to commence during the life of tenant in tail, it is not void, but voidable as to the iſſue. 1 Rol. 842. l. 50. 843. l. 15. Plowd. 437.

But if it be a future leaſe to commence after the death of tenant in tail, it is merely void in its creation; for it is not to commence till the title of the iſſue commences, and that is an elder title concurring with it; and if the law ſhould make it otherwiſe than void, the law would make him a treſpaſſer. *Vide Dy.* 279. *pl.* 7. 2 *Cro.* 565. 1 Sid. 261. Carth. 257.

So in covenant, if one covenant to ſtand ſeiſed to the uſe of *A.* and his heirs, or to the uſe of *A.* for life, remainder to *B.* in fee, the covenant is not void, but puts the eſtate-tail out of the covenantor. Tenant in tail covenants to ſtand ſeiſed to the uſe of A. and his heirs, &c

(*a*) *R. ac. Goodright ex dem. Tyrrell* v. *Mead* and *Shelſon*, 3 *Bur.* 1703. *Vide ac. Stapelton* v. *Stapelton*, 1 *Atk.* 2. *But. n. Co. Lit.* 326. *b.* 331. *a.* *Wright's Ten.* 186. *Plowd.* 557.

A. for life with remainders, it deveſts the eſtate-tail; otherwiſe if the new uſe be to take effect after his death.

But if tenant in tail covenant to ſtand ſeiſed to the uſe of *A.* and his heirs after his death, it is void.

2 Rol. 790. l. 37.

So it is in the caſe at bar, tenant in tail covenants to ſtand ſeiſed to the uſe of himſelf for life, remainder to *J. S.* and his heirs; for the remainder is to take effect after his death, when by his death the title of the iſſue commences, and the covenant as to the eſtate for life to himſelf is void in this caſe, becauſe here is no tranſmutation of poſſeſſion; ſuch covenant is in any caſe only good in reſpect of the remainders, and ſince the remainders are void, the covenant and the firſt eſtate are likewiſe void.

3. Idle *verſus* Coke.

[Paſch. 4 Ann. B. R. 2 Ld. Raym. 1144. S. C. 1 P. Wms. 70. S. C.]

Surrender to A. for life, remainder to A. and his wife for their lives, and their heirs and aſſigns; and for default of ſuch iſſue to A. and his heirs, is a fee in A. and his wife.

H. Seiſed in fee of a copyhold, ſurrendered the ſame to the uſe of himſelf for life, and after that to *Valentine* his ſon and *Alice* his wife, *pro & durante termino vitarum ſuarum naturalium & hered. & aſſignat. prædict. Valentini & Alicæ. Et pro defectu talus exitus*, to the uſe of himſelf and his heirs. And it was held *per totam Curiam*, S. C. 3 D. 186. pl. 14. Rep. A. Q. 57. Holt 164.

Vide ante 618. Surrender to be conſtrued as a conveyance at common law.

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* 1ſt, That a limitation of uſes in a copyhold ſurrender muſt be conſtrued by the ſame rules and in the ſame manner as if it were a limitation in a deed of feoffment, or any other conveyance at common law (*a*); and that the intent of the party is not ſufficient as in a will, for the ſtatute 32 *H.* 8. leaves the teſtator at liberty to expreſs his intent as he pleaſes; but the common law ties up conveyances to ſet form and ſet words.

In a gift in tail it muſt appear of what body the iſſue are to come.

2dly, In a gift in tail it muſt be limited of what body the iſſue is to come, ſo as it may appear by the expreſs words, or ſomething tantamount or equivalent; and therefore a gift to *H.* and his heirs males, or a gift to *H.* and his heirs females, is not an eſtate-tail; becauſe it is not

(*a*) This point is recognized in the caſes of *Sutton* v. *Stone*, 2 *Atk.* 101. *Lovell* v. *Lovell*, 3 *Atk.* 11. In *Fiſher* v. *Wigg*, *ante* 391., 1 *P. Wms.* 14., the majority of the judges held, that a ſurrender might be conſtrued as a will in creating a tenancy in common. In *Rigden* v. *Vallier*, 2 *Ver.* 252., Lord *Hardwicke* thought that upon a covenant to ſtand ſeiſed (and *come ſemble* in caſe of ſurrenders) there was a difference between words of regulation or modification of the eſtate, and words of limitation.

The limitation in this caſe would in a will have clearly been an eſtate-tail. *Vide Morgan* v. *Griffith*, *Cowp.* 234.

ſaid,

ſaid, nor does it appear of whoſe body they are to iſſue. At common law this would not have been a fee-conditional; and the ſtatute *de donis* does not create eſtates-tail, but preſerves them: A fee at common law was either abſolute or reſtrained; thoſe reſtrained fees were either reſtrained as to duration, as a gift to *A.* and his heirs, while ſuch a houſe ſtood, *&c.*, which was a baſe fee; or reſtrained as to what particular heirs, or of whoſe body iſſuing ſhould inherit, which was a fee-conditional, and is by the ſtatute turned into an eſtate-tail; *ergo* this is a fee-ſimple at common law, and is ſo at this day; for there are words to create an eſtate of inheritance, but none to reſtrain that to iſſue or heirs to the body of the party: But a gift to a man and the heirs males of his body, is an eſtate-tail; ſo is an eſtate to huſband and wife, *& hæredibus de ipſis procreatis*, for *de ipſis* is tantamount; ſo if a gift be to *H.* and his heirs, if he have iſſue of his body; and if he die without heirs of his body, the remainder to himſelf and his heirs; for here is an inheritance created, and it is manifeſt he meant heirs of his body, *& voluntas donatoris in charta doni ſui manifeſtè expreſſa de cætero obſervetur*, and this is a neceſſary implication. *Jenk.* 171. 5 *H.* 6. 6. So if a gift be to *A. & hæredibus ſuis ſi hæredes de carne ſua habuerit, & ſi nullos hæredes de carne ſua habuerit*, remainder to the donor: So if lands be given to *A.* [*and his heirs*] *& ſi contingat ipſum obire ſine hæredibus de corpore ſuo*, remainder to the donor, is an eſtate-tail, *per Holt*, C. J. though not given to him and his heirs. *Quære.*

Fee abſolute, baſe, reſtrained, conditional. 2 Bl. Com. 109.

By what words tail may be created. Vide Co. Lit. 20. 10 Co. 87. Moor Caſ. 940. Carth. 343. 5 Mod. 267. 3 Lev. 70. Ld. Raym. 101. Plowd. 141. a.

3dly, They agreed *Beresford's* caſe, *viz.* a feoffment to the uſe of *A.* for life, remainder to *B.* and the heirs males of the ſaid *B.* lawfully begotten, and for want of ſuch iſſue lawfully begotten, to, *&c.* to be an eſtate-tail; for of the ſaid *B.* is *de dicto B.*, or *ex dicto B.*, which is ſufficient to denote *ex quo corpore*; ſo if it were in *Latin*, *remanere prædict. B.*, *& hæredibus de dicto B.*, or *ex dicto B.* But if it were in *Latin remanere dicto B. & hæredibus ſuis*, or *hæredibus ipſius & pro defectu talis exitus*, remainder over, it had been no eſtate-tail.

To B. and the heirs males of the ſaid B. lawfully begotten, and for default, &c. over is tail.

4thly, It was agreed *per Holt*, C. J. *Powys* and *Powell*, Juſtices, that *Valentine* and *Alice* had a fee-ſimple, and not an eſtate-tail, becauſe the words, *& pro defectu talis exitus* import nothing of their dying without iſſue; it is not ſaid *pro defectu talis exitus de corporibus dict. Valentini & Alicia* or *de prædict. Valentino & Alicia*, but generally, whereas every heir is the iſſue of ſomebody. If there had been particular words expreſſed, as if *they die without heirs of their two bodies*, there might be reaſon to turn the expreſs eſtate of fee-ſimple raiſed into tail, which cannot be altered upon a bare implication, the rather in this caſe, becauſe of the word *aſſigns*; for an eſtate-tail is not an aſſignable eſtate.

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2 Bl. Com. 115.

7 Co. 40. *Litt. Rep.* 344. 1 *Cro.* 363. 3 *Cro.* 478. *Plowd.* 541. 3 *Leon.* 5. *Hob.* 32, 37. *Aſſ.* 15. 1 *Cro.* 366. 2 *Sid.* 41. *Gould*, J. *contra*, becauſe the intent of the party was to create an eſtate-tail; and the word *of* in *Engliſh* is equal and tantamount to *de* or *ex* in *Latin*.

Of equal to *de* or *ex* in Latin.

Vide 5 Co. 114, 115. 8 Co. 147. Lit. Rep. 33, 34. 2 Inſt. 107. 1 Lev. 44. 2 Cro. 627. Dyer 300.

Tender and Refuſal, Amends, &c.

1. Giles *verſus* Hart.

[Mich. 9 Will. 3. B. R. 1 Ld. Raym. 254. S. C.]

To a general aſſumpſit, tender and refuſal muſt be pleaded with a *tout temps priſt*, which cannot be after imparlance. 2 Lev. 209. 3 Lev. 24, 103, 146, 277, 440. 1 Show. 129, 130. Comb. 442, 334. Ven. 322. S. C. Comb. 443. Carth. 413. 3 Salk. 343. Holt 556. Caſes B. R. 152.

INDEBITATUS aſſumpſit and *quantum meruit*, and that being requeſted at ſuch a day and place, the defendant refuſed to pay. The defendant pleaded, that at ſuch a day, before the requeſt, he tendered, and the plaintiff refuſed; and that afterwards he was always ready, and tenders the money into Court. Plaintiff demurred, becauſe the defendant had imparled, and becauſe it is not pleadable in an *aſſumpſit*, and becauſe here was no anſwer to the ſpecial requeſt. *Et per Holt*, C. J. Where the agreement is to pay at a certain time, tender at that time, and always ready, is a good plea; but where the money is due and payable immediately by the agreement, the party muſt plead *tout temps priſt* from the time of the promiſe: But this cannot be after imparlance (*a*); for by that it appears he was not always ready; otherwiſe if no imparlance, then he might have pleaded *tout temps priſt* notwithſtanding the ſpecial requeſt laid in the declaration, becauſe it was immaterially alleged there; ſo in debt, though the plaintiff lay a ſpecial requeſt, the defendant may plead *ſemper paratus*, and pray judgment *de dampnis*: And the plaintiff may reply a ſpecial requeſt to ſhew the defendant was not always ready: So in the principal caſe: Yet there is a difference between debt and *aſſumpſit*; for in debt the damages are but acceſſary, but in *aſſumpſit*, are the principal: Therefore in debt, the defendant may plead in bar of the damages; but in *aſſumpſit* the defendant ought to plead *always ready*, with a *profert in cur.*, and demand judgment *de ulterioribus dampnis*.

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S. C. Carth. 413. In pleading tender in debt, defendant prays judgment de damnis; in caſe, de ulterioribus dampnis.

(*a*) *Vi. Cliſt.* 203. *Lut.* 227. *Forte.* 376. *Barnes* 343, 354. *R. H. Bl.* 369. that a tender may be pleaded after a judge's order for time.

2. Sweatland *verſus* Squire.

[Hill. 10 Will. 3. B. R.]

INDEBITATUS aſſumpſit: The defendant pleaded, that before the action, *viz.* ſuch a day, he tendered the ſum of ſo much money, and that he was always after ready, and now is ready, and prays judgment *de dampnis.* Plaintiff demurred. *Et per Cur.* It is not enough that he was always ready ſince the tender; the money was due before, and the neglect of payment was a delay, a breach of contract and a cauſe of action; now here is no damages for that, but thoſe damages and all that part of time remains unanſwered, in reſpect of which the plaintiff ought to have judgment. *Note;* The counſel for the defendant ſaid, that intereſt was due for the time unanſwered, and damages would be recovered in reſpect of that intereſt. *Quod fuit negatum per Powell,* J. Intereſt is recovered by way of damages where damages are recovered *ratione detentionis debiti;* but not where damages only are recovered, for intereſt is not recovered *occaſione dampnorum.* Judgment *pro quer.*

Tout temps prist. Lutw. 226, 283, 368. Comb. 443, 444. 2 Lev. 209.

Intereſt not recoverable where damages only are recovered.

3. Lancaſhire *verſus* Killingworth.

[Trin. 13 Will. 3. B. R. 1 Ld. Raym. 686. S. C. Comyns 116. S. C.]

H. Covenants at two days notice to accept 1000 *l.* ſtock at any time within twelve months, and to pay 2000*l.* on the transfer; and the plaintiff ſhews, that on the ſecond day of *November* he gave the defendant notice he would be at the place the fourth, and that he was there, *& obtulit,* and that the defendant was there. *Per Cur.* When both parties meet at the time and place, he that pleads a tender muſt alſo plead a refuſal; otherwiſe ſuch a plea is naught on demurrer, but good after verdict; and if the defendant be abſent, he muſt ſhew that, and alſo that he was at the time and place, and tendered. *Vide* 1 *Sid.* 31. 17 or 7 *E.* 3. 11. 2 *Saund.* 350. *Peters* and *Opie.*

When both parties meet, refuſal muſt be ſhewn. 1 Saund. 320. 2 Saund. 350. Lutw. 568. S. C. 3 Salk. 344. Caſes B. R. 529. [Sayer 189.]

1 Str. 535. Doug. 730. (703.)

* 3dly, He that pleads a tender at the time and place, and no one there to receive, muſt ſhew at what time of the day he was there, and how long he ſtaid; for he ought to ſhew that he has done all that could be done on his part to accompliſh what by his agreement he was bound to do (*a*). 6 *Co.* 114. *Yelv.* 38. 2 *Cro.* 13.

If one comes not, the pleader muſt ſhew when he came, and how long he ſtaid.

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(*a*) *Vide ac. Str.* 544, 777. 3 *Bro. P. C.* 92.

Muſt ſtay till ſun-ſet, unleſs ſpecial circumſtances ſhewn vary it. Vide 2 Inſt. 107. 8 Co. 147.

3dly, The laſt part of the day is the time the law appoints for a tender, but it muſt be time enough before ſun-ſet for tranſacting the matter which is tendered: Yet in the caſe at bar, wherein there could be no transfer, but at the hours of the company, *i. e.* from ten to twelve, *&c.*, the plaintiff muſt aver the uſage of the company, and ſhew that he came accordingly and ſtaid ſo long.

Ante 514. Poſt 650. 1 Lev. 176, 196.

Term-time, and Computation.

1. Anonymous.

[Mich. 10 Will. 3. B. R.]

PER *Holt*, C. J. Mr. Juſtice *Twyſden* uſed to cite the book of *E* 4., and ſay, they were to hear no law the laſt day of a term.

2. Aſmole *verſus* Serjeant Goodwin.

[Trin. 11 Will. 3. B. R.]

Sundays and holidays computed for acts to be done out of court. Vide poſt pl. 6. 6 Mod. 252. 8 Mod. 21. 3 Burr. 1595. H. Bl 9. 3 T. R. 642. 4 T. R. 557.

CASE againſt the *cuſtos brevium*, the declaration was delivered on *Friday* morning, and rules given to plead within four days, whereas *Holidays* and *Sundays* were not juridical days. *Et per Cur.* We reckon them *non juridici* as to matters to be tranſacted in court, and therefore *Sundays* and *holidays* are no days to move in arreſt of judgment, But as to buſineſs done out of court, as rules to plead within four days, *&c.*, *Sundays* are reckoned the ſame with other days.

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3. Sir Robert Howard's *Caſe*.

[Trin. 11 Will. 3. B. R. At the Sittings at Guildhall.]

Inſurance of H.'s life for a year. H. died on the laſt day: Inſurer liable. Vide ante 413. 5 Rep. 1. b. 3 Lev. 438. 5 Co. 1, 94, 100.

A Policy of aſſurance was made to inſure the life of Sir *Robert Howard* for one year, from the day of the date thereof; the policy was dated on the 3d day of *September* 1697. Sir *Robert* died on the 3d day of *September* 1698, about one o'clock in the morning. *Et per Holt*, C. J. In an action hereupon it was ruled at the ſittings at *Guildhall*, 1ſt, That *from the day of the date* excludes the day, but

from

from the date includes it, ſo that the day of the date is excluded. 2dly, That the law makes no fraction in a day, yet in this caſe he dying after the commencement, and before the end of the laſt day, the inſurer is liable, becauſe the inſurance is for a year, and the year is not complete till the day be over: Yet if *A.* be born on the third day of *September*, and on the ſecond day of *September* twenty-one years afterwards he makes his will, this is a good will; for the law will make no fraction of a day, and by conſequence he was of age. 2 Bulſt. 83, 305. S. C. Holt 195. 2 Mod. 281. Hob. 139.

4. Allen *verſus* Brookbank.

[Trin. 11 Will. 3. B. R.]

UPON a libel in the Spiritual Court for incontinency, the citation was ſerved on the *Sunday*, and fixed on the church-door, and that was objected to be void, becauſe it is a proceſs. *Vide* 22 *Car.* 2. *Holt*, C. J. That ſtatute extends not to this proceſs, nor to ſummons at the church; but only to ſuch proceſs which may as well be executed at any other time. Citation may be ſerved by fixing on the church-door on Sunday. 5 Mod. 450. Carth. 504.

5. Lord Bellamont's *Caſe*.

[Paſch. 12 Will. 3. B. R.]

THE attorney-general moved for a trial at bar laſt paper-day in the term, in an action againſt the governor of *New-York*, for matter done by him as governor (*a*); and granted, becauſe the king defended it. Trial at bar laſt paper-day. Poſt 651.

(*a*) *Vide Comp.* 161.

6. Sir Chriſtopher Hales *verſus* Owen.

[Trin. 2 Ann. B. R.]

SUNDAY is not included in the four days to move in arreſt of judgment, but the defendant muſt have four juridical days. *Vide poſt* 627. 6 *Mod.* 252, *ante pl.* 2. (*b*) Sunday not included in the four days to move in arreſt of judgment.

(*b*) *D. ac.* 4 *Bur.* 2130.

Note; Bail may apprehend his principal on a Sunday. Judge Blencowe's MS. Mich. 3 Ann.

7. Parker *verſus* Sir William Moor.

[Hill. 2 Ann. B. R. 2 Ld. Raym. 1028. S. C.]

H. may be taken on an eſcape-warrant on Sunday. S. C. 6 Mod. 95, 21, 22, 63, 96, 154, 254. 5 Mod. 95, 450. 3 Salk. 348. Bl. Rep. 1273.

ONE was taken on a *Sunday* by virtue of an eſcape-warrant, and it was held good; for one may take another on a *Sunday* upon freſh purſuit, and this is in the nature of it, though it be by a new method, for this is no original proceſs, but the party is in ſtill upon the old commitment continued down (*a*).

(*a*) *Vide* note to *Wilſon* v. *Tucker*, 1 *Salk.* 78., and add, that a defendant in a penal action cannot be taken in execution on a *Sunday*. *Rex* v. *Myers*, 1 *T. R.* 265.

S. C. 6 Mod. 148, 159, 196. Holt 761.

8. Harvy *verſus* Broad.

[Paſch. 3 Ann. B. R.]

Tres Trin. on Sunday, writ of inquiry then returnable, executed Monday, error. 1 Jon. 301. Court takes judicial notice of computation of time. Vide 6 Mod. 41, 81, 148, 160, 252, &c. 1 Leon. 242. & infra. Mod. Caſes 159. S. C. 2 Keb. 59. 1 Jon. 301. Mod. Caſes 41, 81, 160, 252. Jon. 228. Cro. Eliz. 227. Cro. Car. 53. * N. 5 Rep. Gage's c. not amended, but reverſed. Moor 571.

A Writ of inquiry was returnable *tres Trin.*, which was *Sunday*, and the writ was executed on the 14th, and that was *Monday*, which was kept as the *eſſoin-day*, but was a day after *tres Trin.* A writ of error was brought. *Et per Cur.*,

1ſt, A writ may be executed the day it is returnable (*b*), but not after. 2dly, The Court may take notice of this judicially, and there needs no writ of error, and no aſſignment of this for error on the record. So, 5 *Co.* 45., * the Court took notice that the *teſte* of the writ of covenant was after the return. *Vide Co. Ent.* 250. *Mo.* 571., and *Plowden*, *Fiſh*, and *Brocket*'s caſe, the Court took notice the proclamation of a fine was on a *Sunday*. 3dly, There was no difference between *moveable* and *immoveable* feaſts; for the moveable calculation for *Eaſter* was made by the council of *Nice*, but received in *England* and made part of the kalendar, which is eſtabliſhed by the law of *England*: Therefore, whether the feaſt be moveable or immoveable, or whether the computation is by the day of the month or the day of the week, *viz. die Lunæ prox. poſt tres*, &c., as it is in judicial proceedings, we have the ſame law and the ſame rule, and the Court cannot but ſee and take notice of what appears to them. *Vide* 1 *Cro.* 53. 1 *Lev.* 196. 1 *Sid.* 301. *Plowd.* 265, 266. *b. Ro.* 524. *Dy.* 181. *pl.* 52. 21 *H.* 6. 13. *pl.* 4. 3 *Cro.* 227. *Lat.* 118. 2 *Cro.* 506, 548. 1 *Jon.* 301. *Stat. de Anno Biſſextili. Harvey* verſus *Broad.* The judgment was reverſed (*c*).

(*b*) *R. ac.* 2 Ld. *Raym.* 1449. *Bur.* 812. 2 *Wilſ.* 372.

(*c*) *Vide ac. Str.* 811. *Vide Str.* 387.

9. Davies *verſus* Salter.

[Mich. 3 Ann. B. R.]

S. C. 6 Mod. 250, &c. 3 Salk. 246.

A Writ of inquiry was returnable *tres ſeptiman. Trin.*, which was *Sunday* the 13th of *June*, and the writ appeared to be executed the 14th of *June*. Judgment *pro quer.*, and error brought; and *Eyre* urged, that the Court could not take notice of the days of the month. 1 *Cro.* 275, *Yelv.* 140. 1 *Ro. Abr.* 595. *Sed non allocatur*; thus he urged, that *Sunday* ought not to be reckoned, but *Monday* in lieu of it. *Vide Br. c.* 5. 2 *Cro.* 16. 1 *Cro.* 11. *Et per Holt*, C. J. If *Sunday* happen to be the *4to die poſt*, the holding of the term muſt of neceſſity go over till *Monday*. So if *Sunday* happens to be the *eſſoin-day*: And as to the relation of judgment, where the *eſſoin-day* is a *Sunday*, the judgment can only relate to the firſt judicial day. All *quinden. Octab. &c.* are incluſive: Here we enter *die Lunæ, &c.*, and that is incluſive. In *C. B.* they enter *a die Lunæ, &c.*, and yet that is incluſive too: But in the principal caſe there is no neceſſity; the writ might have been executed ſooner, or returned at another day.

Same point, 1 Mod. 402. 2 Danv. 294. 6 Mod. 41, 81, 160, 196.

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1 Jon. 300. 1 Danv. 683. 2 Danv. 254. 6 Mod. 41, 81, 160, 196. 1 Inſt. 135.

Ante 415, 625.

Traverſe.

1. Young *verſus* Ruddle.

[Mich. 7 Will. 3. B. R. 1 Ld. Raym. 60. S. C.]

Vide Lutw. 107, 108, 1359. 2 Cro. 221. 1 Saund. 38. Raym. 467.

ASSUMPSIT and *quantum meruit*: The defendant pleaded he gave the plaintiff a beaver-hat in ſatisfaction of the promiſes, and the plaintiff accepted it in ſatisfaction: The plaintiff, *proteſtando* that he did not give it in ſatisfaction, traverſes, that he accepted it in ſatisfaction; to which it was demurred. 1ſt, It was urged, that this could not be pleaded in ſatisfaction of the promiſes, but ſhould have been of the damages, like *Neal*'s caſe, *Yel.* 192. In debt upon an obligation, the defendant pleaded a load of lime given in ſatisfaction of the obligation, and it was held no plea; for it ought to be pleaded in bar of the money due by the condition. *Sed per Cur.* A releaſe of the condition would have been no bar to debt on the obligation; but a releaſe of the promiſe in the caſe at bar had been

Aſſumpſit, ſatisfaction pleaded; iſſue taken upon the acceptance, good. 5 Mod. 86. S. C. called Young v. Rudd. Carth. S. C. 347., called Young v. Rudd. 5 Rep. Pannell's caſe. Mo. 677, 678. Sty. 239. 9 Co. 39. Cro. El. 68, 193. Comb. 346. Caſes B. R. 85.

Vide Str. 23. 1 Wilſ. 338.

been a good plea. 2dly, It was urged, that this traverſe was naught; for if the gift in ſatisfaction be admitted, his acceptance will not be material. *Et per Holt*, C. J. The acceptance is material as well as the gift; to plead a gift without ſhewing the other received it, would be naught (*a*); either is traverſable. *Vide Hob.* 178. *Et per Roheby*, J. The gift is neither admitted nor confeſſed in this caſe by the plaintiff, becauſe there is a *præſtando* to the gift; ſo that it doth not appear here was any receipt at all.

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(*a*) *R. ac. Str.* 573.

2. Pullen *verſus* Benſon.

[Mich. 10 Will. 3. B. R. 1 Ld. Raym. 349. S. C.]

Non antea held no traverſe where further matter muſt be diſcloſed before he can conclude to the country. Cro. El. 439, 443. 1 Leon. 95. Caſ. 123. 8. C. Caſes B. R. 264. Holt 558.

IN *debt on a bond*, the plaintiff declared, *quod def.* 30 *die Novembr. conceſſit ſe teneri, &c., & profert in cur. ſcriptum prædict. geren. dat. eiſdem die & anno.* Defendant pleads, that it was firſt delivered 30 *die Novembr. & non antea*, and ſhews the writ, on which he was in cuſtody, was returnable *quinden. Martini*, ſo that the bond was taken after the return of the writ; and then relies on the ſtatute of *H.* 6. The plaintiff demurred and had judgment; and the Court agreed, that mere matter of ſuppoſal is not traverſable, no more is matter alleged out of due time, no more is matter immaterially alleged: But they held the 20th day of *November* an expreſs allegation; and that the defendant's plea had made it material; for the validity of the bond turned wholly upon the day of the delivery; upon which reaſon the defendant ſhould have traverſed its delivery on the 20th (*a*). And the Court held the *non antea* was no traverſe, becauſe it is that which cannot be reſted upon; but the party muſt diſcloſe farther matter before he comes to conclude. Cited *Yelv.* 138. 2 *Cro.* 263. 5 *H.* 7. 26. 2 *Keb.* 108. 1 *Sid.* 300. *Yelv.* 31. But *Holt*, C. J. ſaid, that that caſe of *H.* 7. came not up to this caſe.

Com. Pleader, G. 12, 13.

Vide Sand. 22.

(*a*) *Vide Kel.* 229. *Beverly* v. *Pim*, 7 *Mod.* 16. *Benjamin* v. *Howell*, 1 *Wilſ.* 81. 20 *Vin.* 342. 4 *Bac. Ab.* 79.

2 Mod. 68.

3. Chance *verſus* Weeden.

[Mich. 13 Will. 3. B. R. 1 Ld. Raym. 700., named Chauncey v. Winde.]

De injuria ſua propria is a good replication to a juſtification by

TRESPASS for 200 buſhels of ſalt: The defendant ſets forth the act for laying a duty on ſalt 10 *W.* 3. that it was put on board to be exported, not being weighed, *&c.*

&c.; that he was an officer, &c., and ſeiſed it; the plaintiff replied *de injuria ſua propria abſq; tali cauſa*: the defendant demurred. *Et per Holt*, C. J. Where the defendant juſtifies by virtue of an authority by the common law, as a conſtable by arreſt for breaking of the peace, under proceſs of the admiralty, &c., *de injuria ſua propria* is a good replication; ſo it is, and by the ſame reaſon, when one juſtifies by an authority of an act of parliament; for being a general law, the ſtatute can be no part of the iſſue. *Vide* 16 *H.* 7. 2. 5 *H.* 7. 6. *Co. Ent.* 643. A juſtification upon the ſtatute *de malefactoribus in parcis*, and a like replication: As for the caſe in *Crogat*'s caſe of waſte, and enter *pur view*, *Holt*, C. J. ſaid it ſtood on a particular reaſon. Alſo the Court held the plea ill, becauſe it was not ſhewed what ſort of ſalt this was, bay-ſalt, pit-ſalt, white-ſalt, &c., for the ſtatute does not extend to all. Judgment *pro quer.*

the common law or general ſtatute. Vide 1 Lev. 307, 308. 3 Lev. 48. 8 Co. 67. a. Com. Pleader, F. 18. 2 Lev. 11, 12. 3 Lev. 41. S. C. Holt 409. Caſes B. R. 580. Vide 4 Leon. 26.

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4. Haywood *verſus* Davies & al.

[Mich. 1 Ann. B. R. Vide *this Caſe*, *title* Abatement, pl. 10. pag. 4. (*a*)]

WHERE a traverſe ought to conclude to the country, and where with an averment.

(*a*) To the authorities there referred to add *Hodges* v. *Sandon*, 2 *T. R.* 432.

5. White *verſus* Bodinam.

[Paſch. 3 Ann. B. R.]

LESSEE for years brings covenant againſt the leſſor, declaring upon a demiſe and covenant for quiet enjoyment, and aſſigns for breach, that the leſſor did enter upon him and ouſt him of the premiſes. The defendant pleads, that he entered to diſtrain for rent-arrear, *abſque hoc*, that he ouſted him *de premiſſis*. To which the plaintiff demurred, thinking the traverſe ill; becauſe if he ouſted him of any part of the premiſes, he had a good cauſe of action, therefore he ſhould have traverſed, *abſq; hoc*, that he ouſted him of the premiſes, or of any part thereof (*b*). But, *per Cur.* The plea is well enough in this caſe; for if the plaintiff will join iſſue upon the matter of the traverſe, and prove the ouſter of any part, the iſſue ſhall be for him: And the Court took a diverſity between

Abſque hoc, that he ouſted him de premiſſis, goes to every part. Vide 2 Mod. 68. 3 Lev. 113, 227. 2 Co. 1. 8 Co. 61. Vaugh. 175. 3 Cro. 914. 2 Saund. 177. 1 Inſt. 282. Yelv. 30. 1 Lutw. 327. Hob. 53. 1 Vent. 272. S. C. 6 Mod. 150.

(*b*) *Vide Collorne* v. *Stockdale*, *Str.* 694. 8 *Mod.* 58.

pleading

pleading the general iſſue, as in debt, you muſt plead *non debet nec aliquam inde parcellam*, and a ſpecial iſſue, as this is. 3 *Cro.* 83, 84. *Dyer* 115. Judgment for the defendant.

Lutw. 1624, 1625. Quar. 6 Co. 24.

6. Gilbert *verſus* Parker.

[Paſch. 3 Ann. B. R.]

Upon pleading a ſeiſin generally, traverſe may be taken that he is ſole ſeiſed. Vide ante 562. 5 Mod. 150. Cro. El. 172, 785. 2 Saund. 295. 9 Co. 66, 112. Mod. Caſ. 158. S. C.

IN *replevin* for taking cattle, the defendant made conuſance, that *A.* his maſter was ſeiſed of the *locus in quo*, and *per ejus præcept.* he took them damage-feaſant. Plaintiff replied, that he was ſeiſed of one third part, and put in his cattle, *abſq; hoc*, that the ſaid *A.* was ſole ſeiſed. To this the defendant demurred, and judgment was given againſt him; for the defendant makes a conuſance under his maſter as ſole ſeiſed, when he was only tenant in common; in which caſe he ſhould have pleaded according to the truth, that he was only tenant in common, *&c.* When the defendant pleads his maſter was ſeiſed in fee of the place *where*, *&c.*, that muſt neceſſarily be underſtood that he is ſole ſeiſed; and whatever is neceſſarily underſtood, intended, and implied, is traverſable as much as if it were expreſſed; and therefore, though a ſeiſin in fee is only alleged generally, yet that being intended a ſole ſeiſin, the plaintiff may traverſe, *abſque hoc*, that he is ſole ſeiſed; ſince the plaintiff makes himſelf tenant in common with the defendant, it had not been enough to ſay, that he is tenant in common, without traverſing the ſole ſeiſin.

2 Mod. 60. Yelv. 140.

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5 Co. 89. Lutw. 1177, 1316. Ante 580, 583. 3 Lev. 104.

2dly, The Court held he might either traverſe, *abſq; hoc*, that he was ſole ſeiſed, or that he was ſeiſed *modo & forma*. *Hob.* 119. 3 *Cro.* 795. *Winch.* 7. 2 *Mod.* 6. *Dyer* 280., of which the Court doubted, but ſaid there might be difference between parceners and tenants in common who are ſeiſed *per my & per tout*. *Vide* 1 *E.* 4. 9. 2 *Vent.* 228. *Hutt.* 120. *Hob.* 72. *Mo.* 863. 37 *H.* 6. 31. *Kel.* 27. 1 *Leon.* 78. 32 *H.* 6. 2, 6. 21 *E.* 4. 65.

Treaſon.

See 1 Hawk. P. C. cap. 17. Hale's P. C. 10, 11, &c. Kely. Rep. 2, 3, 4, &c.

1. Rex & Regina *verſus* Geary.

[Mich. 1 W. & M. B. R.]

Attainder of treaſon reverſed for want of an allocatus before judgment. Vide ante 576. S. C. 1 Show. 131.

GEARY was attainted of high treaſon on an indictment, to which he pleaded guilty. Upon a writ of error brought to reverſe this attainder, the exception taken was, that it did not appear he was aſked what he had to ſay why judgment ſhould not be given againſt him; and all the precedents are with an *allocutus quid*, or *ſi quid pro ſe dicere habeat, &c. Vide Plowd.* 387. *Co. Ent.* 532. *Raſt.* 455. And the Court held the exception good, for he might have matter to move in arreſt of judgment, or a pardon; and the attainder was reverſed.

2. Tucker's *Caſe*.

S. C. Show. P. C. 186. & vide 1 Ld. Raym. 127. & poſt. 632.

[Paſch. 5 & 6 W. & M. B. R. 1 Ld. Raym. 1. S. C.]

Judgment in treaſon reverſed for want of the words contra ligeantiæ ſuæ debitum in the indictment. 3 Lev. 396. 4 Mod. 162. Comb. 257. Skin. 338, 360, 425, 442. Carth. 317. Caſes B. R. 51. Holt 678. 3 Lev. 396. 4 Mod. 162.

REGINALD *Tucker* brought a writ of error to reverſe an attainder of high treaſon, upon an indictment againſt him for the rebellion in *Monmouth*'s time. The indictment was, that the defendant and another, *ligeantiæ ſuæ * debitum minime ponderan.*, did traitorouſly wage war againſt the king *verum & naturalem dominum ſuum contra pacem, &c.*

It was held, 1ſt, That the want of the words, *contra ligeantiæ ſuæ debitum*, ſuppoſing them to be neceſſary, were not ſupplied by the firſt words, *ligeantiæ ſuæ debitum minime ponderan., &c.*, for a man may not conſider his duty, and yet may not act or offend againſt it: And *contra ligeum ſuprenum dominum ſuum*, are not now neceſſary, nor were they anciently uſed. Theſe do not poſitively expreſs, but imply only, that the defendant acted againſt his allegiance; and indictments ſhall not be made good by intendments.

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Poſt. 633. 3 Inſt. 11. Hob. 271. Co. Lit. 129. Calvin's Caſe 6, 7. Carth. 317.

2dly, Without the duty of allegiance there can be no treaſon, therefore an alien enemy cannot commit treaſon (*a*); an alien *amy* being here may: That for want

Indictments not

(*a*) This ſeems to be not perfectly correct; for though aliens invading this kingdom are not guilty of treaſon, the ſubjects (who reſide within this realm) of a prince or ſtate at enmity with *Great Britain* are puniſhable as traitors for any act within the realm which would be treaſon in a natural-born ſubject. *Vide* 1 *Hawk.* ch. 17. ſ. 5. *Foſter* 185.

therefore

to be ſupplied by intendment. See 2 Hawk. P. C. 224 to 256. what certainty neceſſary in indictments. Dyer 155. 1 Inſt. 129. 3 Inſt. 11. Vide 2 Hawk. P. C. 252.

therefore of theſe words, the crime wants a due deſcription.

It is true, ſome precedents of indictments want the words *contra ligeantiæ ſuæ debitum*. But to theſe the Chief Juſtice ſaid, they were caſes of treaſon made by particular acts of parliament, and not where the fact was treaſon in its nature; and that in ſuch caſe it was ſufficient if the indictment purſued the words of the ſtatute, and concluded *contra formam ſtatuti*, without concluding *contra ligeantiæ ſuæ debitum*. The attainder was reverſed (*a*).

(*a*) This judgment of reverſal was affirmed in Parliament. 1 Ld. *Raymond* 2. *Show. P. C.* 186, 7.

Vide 1 Hawk. P. C. cap. 17. &c. 32, 33, 34.

3. Charnock's *Caſe*.

[7 Will. 3. *At the* Old-Bailey.]

Words of perſuaſion or conſultation, an overt act of treaſon in compaſſing the king's death. Vide Cro. Car. 125 & 332, 333. S. C. Ante 288. 3 Salk. 81. Holt 133, 301, 681. Foſter 200. 1 Hale 111, 323. 1 Bl. Rep. 37.

THE queſtion was at the trial, Whether words could be an overt act of treaſon in compaſſing the death of the king? For *Hale, Placit. Coron.* 13. ſays, Words are not an overt act of treaſon, unleſs ſet down in writing. *Et per Holt*, C. J. Looſe words ſpoken without relation to any act or project, are not treaſon: But words of perſuaſion to kill the king are overt acts of high treaſon; ſo is a conſulting how to kill the king; ſo if two men agree together to kill the king; for the bare imagination and compaſſing makes the treaſon, and any external act that is a ſufficient manifeſtation of that compaſſing and imagining, is an overt act: It was never yet doubted, but to meet and conſult how to kill the king, was an overt act of high treaſon. *Vide Cro. Car.* 117.

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S. C. Parl. Caſ. 127, &c.

4. Dominus Rex *verſus* Walcot.

[Trin. 7 Will. 3. B. R.]

Judgment in treaſon reverſed for want of the words ipſo vivente, or in conſpectu ejus, as to burning the bowels. Vide Parl. Caſ. 127, &c. & 186, &c. Ante 630. 3 Lev. 396. 4 Mod. 162, 395. Carth. 342. S. C.

WRIT of error to reverſe a judgment againſt the defendant in an indictment of high treaſon: The judgment was, *quod interiora extra ventrem trahentur*; but theſe words, *in conſpectu ejus & ipſo vivente comburentur*, were omitted: It was agreed, that if this be a neceſſary part of the judgment and omitted, the judgment is erroneous; for the judgment, in capital caſes eſpecially, is ſtated, and not arbitrary; and it was held that this was a neceſſary part; for though death is the *ultimum ſupplicium*, yet death inflicted one way is more ſevere than another, and more formidable; and if this judgment be right, all other

other judgments are wrong, for all others have theſe words, *viz. In conſpectu, &c. Vide* 1 *H.* 7. 24. *Br. Coron.* 121. *Stow's Annals* 513. *Plowd.* 387. *Raſt.* 545. *Staund.* 128. *Co. Ent.* 422, 423. *Harriſon*, one of the regicides, roſe up and ſtruck his executioner after his bowels were cut out, which ſhews the thing is not impoſſible, though that be not very material. At another day it was inſiſted, that the record below was right on an affidavit, that ſwore, that the words *ipſo vivente* were in the record below, and therefore it was prayed, that the clerk of the peace might attend by rule, which was granted; and upon his attendance it appeared upon examination, that the minutes of the judgment taken and entered upon the record of the indictment had theſe words in; but Mr. *Turner*, clerk of the peace, ſaid, that Sir *Robert Sawyer*, then attorney-general, after the trial ſaid, that uſe was to be made of the record in *Ireland*, and therefore examined it before it was tranſcribed, and then this record, which is now certified, was entered at large; ſo that the queſtion was, Which was the record? *Et per Cur.* That which was entered at large is the record. Then the counſel moved it might be amended by the minutes: And *Holt*, C. J. ſaid, that if it were amendable, they could not amend it here; for if a record in *C. B.* be erroneous, we cannot amend it here; but upon diminution alleged here, we grant a *certiorari*; but there can be no diminution alleged at the *Old Bailey*.

2dly, He queſtioned much if it were at all amendable, and cited *Sampſon's* caſe, *Jones* 421., where the Court were divided; and it is there ſaid by *Kelynge*, that there were no precedents of any ſuch amendments. And after the caſe had been argued ſeveral times at the bar, upon the matter in law, the Court, *Trin.* 8 *W.* 3., unanimouſly, upon ſolemn arguments, reverſed the attainder, for want of the words *ipſo vivente*, or *in conſpectu ejus*.

Staund. 182. 3 Inſt. 211. Comb. 369. Caſes B. R. 95. Holt 680. 3 S. T. 600. 6 S. T. Ap. 42. Skin. 442. 2 Hawk. c. 48. ſ. 3. and note to 6th ed. thereof.

Record of judgment in treaſon refuſed to be amended by the minutes of the Court of Old Bailey. Vide 2 Hawk. P. C. 247.

Bur. 2527.

5. Cranburn's *Caſe*. [633]

[Paſch. 8 Will. 3. B. R.]

CRANBURN, a natural-born ſubject of *England*, was indicted of high treaſon *contra ligeantiæ ſuæ debitum*. It was objected, that it ought to be *naturalis ligeantiæ ſuæ debitum*, or *contra ſupremum naturalem dominum ſuum*, to diſtinguiſh it from that which is local allegiance; for there are two ſorts of allegiance; a natural allegiance, as that of ſubjects; and a local allegiance, as that of ſtrangers reſiding here; and this is the allegiance in the indictment mentioned. *Sed per Cur.* If an alien be indicted for treaſon

Subject indicted for treaſon contra ligeantiæ ſuæ debitum, well; otherwiſe if naturalized, &c. in the caſe of an alien. Ante 631. 3 Inſt. 5, 11. Hob. 271. Co. Lit. 129. S. C.

Holt 686. 4 S. T. 686. 6 S. T. Ap. 56.

ſon *contrà naturalem dominum ſuum*, or *naturalis ligeantiæ ſuæ debitum*, the defendant may give in evidence that he is an alien; for the indictment is reſtrained to that ſpecies of allegiance which is not due; but a ſubject may be indicted ſo, or *contra ligeantiæ ſuæ debitum*; for allegiance is the *genus*, which being ſet forth, all ſpecies are compriſed under it.

In indictments for compaſſing the king's death, the treaſon being firſt laid, the overt act need not be laid proditorie. See 1 Hawk. P. C. 38, 39, &c.

The indictment was, that at ſuch a time and place *proditorie tractaverunt propoſuerunt & conſultaverunt de viis & modis quomodo dominum regem interficerent & conſenſerunt & agreaverunt quod quadragint. homines equeſtres* ſhould be provided, &c., for that end.

It was objected, that here are two diſtinct acts of high treaſon, and the latter is not laid to be done *proditorie*. *Sed non allocatur*; for, by Mr. *Cowper*, the *et* makes the whole but as one ſentence; at leaſt it conveys the force of the words in the former ſentence to this, and makes it partake of them. *Et per Holt*, C. J. Here is but one treaſon alleged, *viz.* compaſſing the death of the king, and that is ſaid to be *proditorie*; therefore it need not be repeated again in ſetting forth the overt act; for the overt act is not the treaſon, but evidence of the treaſon. The treaſon itſelf lies in compaſſing, which is an act of the mind. Accordingly in the caſe of the regicides it was agreed, that the indictment ſhould not be for killing the king, but for compaſſing and imagining his death, and that the killing ſhould be alleged as the overt act; for by the ſtatute the treaſon conſiſts in the intention. But if a diſtinct treaſon, as that of levying war, had been alleged, where the treaſon conſiſts in the act and not in the intention, the act muſt have been ſaid to be done *proditorie*; for the act of levying is a treaſon, and not an overt act of treaſon or bare matter of evidence.

Otherwiſe where the treaſon conſiſts in the act.

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6. Cook's *Caſe*.

[8 Will. 3. *At the* Old-Bailey.]

Copy of indictment not granted after pleading.

IN the indictment againſt *Cook*, after the Court was ſat and the jury called, but not ſworn, Sir *Bartholomew Shower* of counſel for the priſoner made objections to the indictment, but it was held right enough; upon that he urged, that then he had not had a copy, and the priſoner could not be tried. *Et per Cur.* By the words of the act he is to demand it, and he has it to enable him to plead, and till then he is not to plead. In this caſe he has pleaded; therefore this benefit is waived, and the priſoner has admitted he has a copy, or did not think it for his ſervice

to require it, but was able to plead without the help of it (*a*).

(*a*) By ſtat. 7 *Ann. c.* 21. the party indicted ſhall have a copy of the indictment, and a liſt of all the witneſſes to be produced, and the jurors impannelled, delivered to him ten days before the trial.

7. Vaughan's *Caſe.*

THE defendant was indicted for treaſon, in adhering to the king's enemies, *cum pluribus ſubditis Gallicis inimicis domini regis*, and that they did navigate a certain veſſel called *Clancarty*, with a deſign to deſtroy the king's ſhips. And it was held by *Holt*, C. J. and the other juſtices at the trial, that an indictment for levying war, or adhering to the king's enemies generally, without ſhewing particular acts or inſtances, is not good; for the words of the ſtatute are, *and thereof be provably attainted by ſome overt deed*, which comes after the particulars of compaſſing the king's death, levying war, and adhering to the king's enemies; and it would be violence to reſtrain them to the firſt article only without regard to the laſt, to which they are equally connected; if they are to be reſtrained to a ſingle article, it ought rather to be referred to the article of adhering only.

Indictment for treaſon in levying war, or adhering to the king's enemies generally, without ſhewing particular inſtances, not good. Vide 1 Hawk. P. C. 37, 38. S. C. Holt 689. 5 S. T. 17. 6 S. T. Ap. 57.

And if it be not a good indictment without ſpecial acts, *&c.*, the queſtion is, Whether thoſe that are alleged ought not to be proved, and no others? *Et per Holt*, C. J. A diſtinct overt act cannot be given in evidence, unleſs it relate to that which is alleged, or conduces to the proof of it. But if it conduce to prove an overt act alleged, it is good evidence; as if conſulting to kill the king be alleged, any actings or doings in purſuance of that conſultation may be proved; for it proves their agreement and conſent, and is a farther manifeſtation of the act alleged in the indictment.

Foſter 245.

It was alſo objected, that in evidence the ſeamen muſt appear to be *Frenchmen* born; for if they were *Dutch*, they are not *ſubditi Gallici.*

2dly, That though he was ſaid to adhere to the king's enemies, yet it was not ſaid to be againſt the king.

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3dly, That this was not a ſufficient act of adhering, without fighting, or ſome act of hoſtility. *Et per Cur.*

1ſt, If the *States* be in alliance, and the *French* at war with us, and certain *Dutchmen* turn rebels to the *States*, and fight under command of the *French* king, they are *inimici* to us, and *Gallici ſubditi*: For the *French* ſubjection makes them *French* ſubjects in reſpect of all other nations but their own; and if ſuch cruiſe at ſea, and an *Engliſhman*

Joining with rebels ſubjects of the king's ally, fighting under the command of an enemy prince, is treaſon in adhering, &c.

man aſſiſt them, he is a traitor, but not a pirate, for none are pirates that act under the command of a ſovereign prince.

Though the fighting be directly againſt an ally. Vide 1 Hawk. P. C. 37, 38.

2dly, Adhering to the king's enemies muſt of neceſſity be againſt the king; and therefore if an *Engliſhman* aſſiſt the *French*, being at war with us, and fight againſt the king of *Spain*, who is an ally of the king of *England*, this is treaſon, as adhering to the king's enemies againſt the king; for the king's enemies are hereby ſtrengthened and encouraged, and ſo is within the expreſs words of 25 *E.* 3. of adhering to the king's enemies; and it is ſufficient to allege the treaſon in the words of the ſtatute.

Cruiſing is a ſufficient overt act.

3dly, Cruiſing is a ſufficient overt act of adhering, comforting, and aiding; as if *Engliſhmen* would liſt themſelves and march, this is ſufficient without coming to battle, and there may be levying war without actual fighting. *Vide Vaughan's trial.*

See Raym. 367. *That an indictment for high treaſon may be tried by niſi prius.*

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[636] # Treſpaſs.

1. Incledon *verſus* Burgeſs.

[Mich. 1 W. & M. B. R. Intr. Mich. 4 Jac. 2. Rot. 282.]

Contra pacem is ſubſtance. Vide poſt. 641. Cro. Jac. 527. 1 Hawk. 244. 2 Hawk. 243. 6 Mod. 128. 4 Mod. 145. 1 Salk. 67. Yelv. 66. Vide

TRESPASS for breaking, entering, and depaſturing, 36 *Car.* 2., *continuando* the depaſturing till 4 *Jac.* 2., *contra pacem domini regis nunc*, which was K. *James* the Second. This was held naught, for then there is no *contra pacem* to the treſpaſs *tempore Caroli Secundi*, but it is omitted, and *contra pacem* is ſubſtance. *Vide Cro. Car.* 325. *Cro. Jac.* 426, 443, 537.

1 Sid. 253. 2 Cro. 377. 2 Vent. 49. Show. 27. Comber. 165. S. C. Carth. 65. S. C. Holt 342. 4 & 5 Ann. c. 16. muſt be taken advantage of on ſpecial demurrer.

2. Hore *verſus* Chapman.

[... 1 Will. & M. B. R.]

Declaration in treſpaſs, Quare vi & armis, &c. iii. See 2 Lev.

IN treſpaſs the plaintiff declared, *quare vi & armis clauſum fregit*, and, after verdict for the plaintiff, judgment was arreſted, for *quare* is not poſitive but interrogatory,

tory, and much worſe than *quod cum*. *Vide* 1 *Cro*. 420. 2 *Cro*. 47. 2 *Bulſt*. 214. *Godb*. 251. 2 *Keb*. 400. 1 *Sid*. 326. 3 *Cro*. 57. 1 *Keb*. 377.

206. 2 Jon. 197, 2 Show. Caſ. 17. 180, 294. Con. 413. 1 Wilſon 99. 2 Wilſon 203. Contra.

3. Wildgooſe *verſus* Kellaway.

[Trin. 3 W. & M. B. R. Rot. 268.]

TRESPASS for breaking his houſe and taking away his diſhes; the defendant juſtified under a by-law, but that being ill, the plaintiff demurred; but the defendant took exception to the declaration, becauſe it wanted the words *vi & armis*; and the Court held it naught on a general demurrer (*a*), being an omiſſion of the ſubſtance; for it alters the judgment from a *capiatur* to a *miſericordia*. *Item*, It belongs to the juriſdiction of the county court, if it be a treſpaſs without *vi & armis*.

Declaration in treſpaſs without vi & armis, ill on a general demurrer. Vide 1 Hawk. 145, 149, 150. 2 Hawk. 241, 242.

(*a*) By ſtat. 4 and 5 *Ann. c.* 16. it is aided on a general demurrer.

4. Smith *verſus* Kemp.

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[Trin. 4 W. & M. B. R.]

S. C. 4 Mod. 186. Skin. 342. Holt 322.

TRESPASS *vi & armis*, for taking fiſhes *ex libera piſcaria ſua*. Upon not guilty pleaded, and verdict for the plaintiff, it was moved in arreſt of judgment by *Carthew*, that he that had *libera piſcaria*, could not maintain treſpaſs; and compared it to the caſe of a commoner who could not bring treſpaſs for a treſpaſs done in the common: That *libera piſcaria* was not like *libera warrena*, for he did allow that he who had *libera warrena* might have treſpaſs againſt any one but the owner of the ſoil, for hunting in his free warren. 2 *Ro*. 111, 550., becauſe *libera warrena* was a liberty to hunt in one's own or another's ground, excluſive of all others; and that this was granted by the king, who is maſter of all games: But *libera piſcaria* was only a freedom of fiſhing with others, and the ſame with *communis piſcaria*, and for this he cited 1 *Inſt*. 122., and that ſuch a grantee had only a liberty to take fiſh, and no property in them until taken; and ſo prayed that judgment might be arreſted.

Treſpaſs lies for fiſhing in libera piſcaria, and taking his fiſh. Comber. 11, 433. 464. 4 Mod. 186. Carth. 285. S. C. H. who hath free warren, may bring treſpaſs againſt any but the owner of the ſoil, for hunting there. 6 Mod. 183. 2 Keb. 178. 3 Mod. 97. 1 Mod. 105.

Holt, C. J. cited and relied upon the *Reg*. 95. in point, where there is the ſame writ, and likewiſe in *F. N. B*. 15. *G. H*. 43 *E*. 3. 11, 6., and ſaid there were three ſorts of fiſheries. 1. *Separalis piſcaria*, and there, he who had the fiſhery was owner of the ſoil, and therefore it is a good

Vide Dav. Rep. 159. 1 Salk. 137.

plea in an action brought by him, that it is *liberum tenementum* of another. 2dly, *Libera piſcaria*, which is where the right of fiſhing is granted to the grantee, and ſuch a grantee hath a property in the fiſh, and may bring a poſſeſſory action for them, without making any title. 3dly, *Communis piſcaria*, and this was to be reſembled to the caſe of other common; and diſallowed the authority of 1 *Inſt.* 122. (a) *Eyre*, Juſtice, ſaid, that he took 1 *Inſt.* 122. to be law, and that many judgments and precedents were founded upon that caſe, and that *libera ex vi termini* did imply common, which the Chief Juſtice and *Dolben* denied in defence of the Regiſter. *Et nota dict. fuit per Carthew* in this caſe, that there were ſeveral writs there againſt law, particularly *R.* 105., treſpaſs *per* baron and feme for aſſaulting the wife, and taking the goods of the huſband.

H. having libera piſcaria hath property in the fiſh, and Co. Lit. 122, denied. Vide ante 556. 11 Co. 17, &c. Cro. Car. 553, 554.

(a) The paſſage in 1 *Inſt.* 122. relative to this ſubject is as follows: "A man may preſcribe to have *ſeperalem piſcariam* in ſuch a water, and the owner of the ſoil ſhall not fiſh there; but if he claim to have *communiam piſcariæ*, or *liberam piſcariam*, the owner of the ſoil ſhall fiſh there." In 2 *Bl. Com.* 39. it is ſtated, agreeably to the opinion of *Holt*, that ownerſhip of the ſoil is eſſential to a ſeveral fiſhery; but in *Seymour* v. Lord *Courtenay*, 5 *Bur.* 2814. the Court declined giving any opinion upon the point. In *Kumerſley* v. *Orpe*, *Doug.* 56. it is mentioned as a point which ſeems ſtill not quite ſettled. Mr. *Hargrave*, in a note to the above paſſage, in 1 *Inſt.* obſerves, "We do not underſtand why a ſeveral fiſhery ſhould not exiſt without the ſoil, as well as a ſeveral paſture." And, having examined the authorities in ſupport of the contrary poſition, he ſays, "The arguments, as it ſhould ſeem, are ſhort of the purpoſe, for at the utmoſt they only prove, that a ſeveral fiſhery is preſumed to comprehend the ſoil, till the contrary appears, which is perfectly conſiſtent with Lord *Coke*'s poſition, that they may be in different perſons; and indeed appears the true doctrine upon the ſubject." In *Seymour* v. Lord *Courtenay* it was ruled, that a grant of fiſhery, with the exception of oyſters, and a reſervation of a right to take fiſh for the grantor's own table, conſtituted a ſeveral fiſhery, no other perſon having a co-extenſive right with the grantee. It was held, that it *could* not be a free fiſhery, becauſe no perſon had a co-extenſive right.

5. Gibbon *verſus* Pepper.

[Paſch. 7 Will. 3. B. R. 1 Ld. Raym. 38. S. C.]

Juſtification muſt confeſs the treſpaſs. S. C. 4 Mod. 404. 2 Lev. 179. 4 Mod. 404. S. C. Styl. 72. 1 Vent. 295. 2 Jo. 205.

IN treſpaſs and aſſault, *&c.*, the defendant pleaded that he was riding a horſe in the king's highway, and that his horſe being frightened ran away with him, and that the plaintiff * and others were called to, to go out of the way, and did not; and the horſe ran upon the plaintiff againſt his will, *&c.* The plaintiff demurred, and had judgment; not but if the defendant had pleaded not guilty,

guilty, this matter might have acquitted him upon evidence; but the reaſon of their judgment was, becauſe the defendant juſtified a treſpaſs, and does not confeſs it; for if *A.* beats my horſe, by which he runs on another, *A.* is the treſpaſſer, and the rider is not. And as to *Hob.* 134. *Mo.* 864. *placito* 1192. 1 *Brownl. Precedents* 188. they differ, for in them a battery is confeſſed.

3 Lev. 37. 1 Saund. 3. Hob. 134. Rol. Abr. 548. Style 72.

Vide 3 Wilſ. 411.

6. Aſhmead *verſus* Ranger.

[Trin. 11 Will. 3. B. R. 1 Ld. Raym. 551. S. C. Comyns 71. S. C.]

TRESPASS was brought by leſſee of a copyholder for life, for breaking his cloſe, and cutting down his trees; the defendant juſtified as ſervant to the Earl of *Kent*, lord of the manor. The plaintiff replied, that the copyholder was tenant for life, his houſe in decay, and that the trees growing on the land were not ſufficient to repair, &c. Upon demurrer, *Holt*, C. J. held, that 3 *Cro.* 5. was not law, and that the copyholder was tenant of the trees as much as of the land; that the fruit and the acorns belonged to the tenant; and he held, that if *H.* has all the thorns in ſuch a place for eſtovers, he may maintain treſpaſs againſt any one that cuts them, even his grantor, and in ſuch caſe need not aver that he burnt them. But where *H.* hath only eſtovers to be taken in ſuch a wood or place, and the grantor cuts the whole, the grantee may maintain caſe againſt the grantor, but not treſpaſs *vi & armis*; and the whole Court held the action was well maintained by the poſſeſſory right which the plaintiff had: The judgment was affirmed in *Cam. Scacc.* but reverſed in the Houſe of Lords; for the tenant could not cut the trees; and if the lord could not, they muſt rot on the land; for then nobody could.

Treſpaſs by leſſee of a copyholder for life, for cutting down by the lord of the manor, held maintainable in B. R. and affirmed in Cam. Scacc. but reverſed by the Lords. S. C. Caſes B. R. 378. Holt 162. Forr. 152. S. C. Vide 1 Leon. 272.

7. Monkton *verſus* Paſhley.

S. C. 6 Mod. 38. Holt 697.

[Hill. 1 Ann. B. R. 2 Ld. Raym. 974. S. C.]

TRESPASS for entering his cloſe and hunting ſuch a day *continuando tranſgr. præd. quoad* the hunting, *diverſis diebus & vicibus*, from the day of the treſpaſs alleged till ſuch a day. *Salkeld* urged that this appeared not to be continued; that ſome acts were permanent without intermiſſion or repetition, which properly lie in continuance, others not.

Treſpaſs for entering his cloſe and hunting, laid with a continuando, and held well. Vide poſt. pl. 8. 2 Mod. 253. 2 Salk. 359.

5 Mod. 178. 1 Sid. 319. 6 Mod. 39. 1 Lev. 210. 1 Vent. 363, 224, 249. 2 Rol. Abr. 549. 2 Mod. 253. Yelv. 126. Raym. 396. Cro. Eliz. 182.

2dly, That ſome acts terminate in themſelves and cannot be repeated, as killing a dog, when once done it cannot be done again; therefore this cannot be laid with a *continuando*. *Vide* 1 *Lev.* 210. 2 *Ro. Abr.* 549. And as to repeatable acts, wherever the firſt treſpaſs is without an ouſter, there every ſeveral entry is a diſtinct treſpaſs and a new treſpaſs, and not a continuance of the firſt; for a releaſe of the firſt would not diſcharge the ſecond. *Vide Cro. Jac.* 107. *Yelv.* 126. [which *Holt.* C. J. denied; for the continuance muſt be anſwered as well as the firſt act.] But where the firſt entry is with an ouſter, there every other act or entry during the ouſter is but a continuance of the firſt treſpaſs, and a releaſe of the firſt diſcharges all. *Vide* 1 *Brownl.* 223. *Cro. Eliz.* 210. 1 *Lev.* 210, compared with 1 *Sid.* 319, and ſo is *F. N. B.* 91. *b.* to be intended. So is 20 *H.* 7. 3. 2 *Ric.* 3. 15. 21 *H.* 8. 43. *Holt*, C. J. held, that of acts that terminate in themſelves, and once done, cannot be done again, there can be no *continuando*, as hunting and killing a hare or five hares, but that ought to be alleged, that *diverſis diebus & vicibus inter* ſuch a day and ſuch a day, he killed five hares, or cut and carried twenty trees: And where a treſpaſs is laid in continuance, that cannot be continued, exception ought to be taken at the trial, for he ought to recover but for one treſpaſs. The Court held, that hunting might be continued as well as ſpoiling and conſuming his graſs, or cutting his graſs; and as to the caſe of an entry and ouſter the Court held, that the plaintiff being ouſted and having made a re-entry, might bring treſpaſs, and declare that he entered ſuch a day, *continuando*, &c., or that he entered ſuch a day, *& diverſis diebus & vicibus* between ſuch a day and ſuch a day. And the plaintiff had judgment.

Acts that being once done cannot be repeated, cannot be laid with a continuando. Comb. 193, 377, 427, 433. Fareſt. 152. 5 Mod. 178.

Cowp. 828. 1 Ld. Raym. 239.

8. Brook *verſus* Biſhopp.

[Hill. 1 Ann. B. R. 2 Ld. Raym. 823. S. C.]

Comb. 426, 427.

Treſpaſs in cutting down ſuch a number of trees cannot be continued; but a general continuando ſhall be applied to what may be continued after verdict. Vide ante, pl. 7. Fareſt. 152. 1 Ld. Raym. 239. Skin. 42. 2 Sho. 196.

TRESPASS *quare vi & armis* the defendant, on the 2d of *April*, broke and entered his cloſe, and trod down his graſs, *nec non arbores ſuas, viz.* 10 *populos & ſubboſcum ſuum, viz.* 10 *careclatas ſubboſci ſuccidit cepit & aportavit tranſgreſſiones præd. uſq;* 27 *Aprilis diverſis diebus & vicibus continuando*; and after verdict and entire damages, it was reſolved, 1ſt, That the continuance, as to the poplars and underwoods, was impoſſible, and could not be.

2dly, That no part of the damages ſhall be intended to be given for that, but ſhall be applied to ſuch treſpaſſes as may

may be continued, according to 1 *Vent.* 363., *continuando tranſg. præd.* generally, ſhall only refer to ſo much as lies in continuance; but if it be *continuando* ſuch and ſuch particulars, and they lie not in continuance, it is naught after verdict. T. Jon. 194. Cowp. 828.

9. Joce *verſus* Mills. [640]

S. C. 6 Mod. 14.

[Trin. 2 Ann. B. R. 2 Ld. Raym. 890. S. C.]

TRESPASS *quare clauſum ſuum apud D. fregit & duos equos apud D præd. in clauſo præd. invent. exiſten. & centum congios tritici de bonis propriis ipſius adtunc & ibidem ſimilit. invent. & exiſten. cepit & aſportavit, &c.* The defendant pleaded not guilty to all but the two horſes, and as to them a diſtreſs for rent; upon which it was demurred, the iſſue being found for the plaintiff, and contingent damages entirely given on the demurrer: And now the plea being held an ill plea, Mr. *Branthwayte* moved in arreſt of judgment, that the horſes were not laid to be the goods of the plaintiff; for that it did not follow that they were the plaintiff's horſes, becauſe found on the plaintiff's cloſe. *Vide* 2 *Cro.* 46. *Yelv.* 36. *equum cepit a perſona ſua.* 2 *Lev.* 156, 430. 3 *Bulſt.* 303. *quod fuit conceſſ. per Cur.*

Treſpaſs quare duos equos apud D. in clauſo præd. invent. exiſten. & tritticum de bonis propriis ipſius A. &c. cepit, does not ſhew the property of the horſes. Vide ac. 1 Ld. Raym. 239. Yelv. 36. Bl. 980. 1 T. R. 480.

2dly, It was urged and admitted, that the plea did not confeſs a property; for the defendant might diſtrain the goods of a ſtranger for the rent.

Plea of taking by diſtreſs for rent does not confeſs property.

3dly, It was held, that the copulative *et* did not let it into the ſubſequent part of the other ſentence, ſo as to make the horſes come under the *de bonis propriis*, like the caſe in *Raymond* 395. Treſpaſs for taking a mare *ipſius quer. nec non bona & catalla ſequent.*, nor 2 *Saund.* 379., which caſes were allowed; and the reaſon is, becauſe they are different ſentences, and the firſt is cloſed up by the place being added: Yet *Gould*, J. agreed the caſe in 2 *Ro.* 250. *placito* 7.; for there, by virtue of the copulative, the *ipſius querentis* goes to all.

4thly, It was held the plaintiff could have no judgment, becauſe the conditional damages were entire, *ſecus* if ſeveral. Vide 3 T. R. 435.

10. Ruſſel *verſus* Comb.

S. C. 1 Salk. 119. Vide poſt. 642.

[Mich. 2 Ann. B. R. 2 Ld. Raym. 1031. S. C.]

WHERE matter may be laid as aggravation of treſpaſs, for which alone treſpaſs lies not, *vide* this caſe, title *Baron and Feme*, *pl.* 12. *pag.* 119. 2 Cro. 123. Mod. Caſ. 127, 145.

S. C. 6 Mod. 80.

11. Day *verſus* Muſkett.

[Mich. 2 Ann. B. R. 2 Ld. Raym. 985. S. C.]

Treſpaſs laid in a former king's time, contra pacem of the preſent, ill on demurrer, but cured by verdict.

*[641]

Cro. Jac. 527. Yelv. 66. Vide ante 636. 1 Hawk. 244. 2 Hawk. 243. 1 Sid. 253. Carth. 65. Comb. 166. 4 & 5 Ann. c 16.

TRESPASS *quare vi & armis primo die Febr. ann. Dom.* 1701, *clauſum ſuum fregit*, and concludes *contra pacem dominæ Annæ nunc reginæ, &c.* The defendant pleads, that he and another did the treſpaſs jointly, and that the plaintiff * *relaxavit* to the other. To that it was replied *non eſt factum*; to which it was demurred, and judgment *pro def.*, for King *William* died the 8th of *March* 1701, ſo it was *contra pacem regis*, and not *contra pacem reginæ*; the omiſſion of *contra pacem* had been only matter of form, but here it is repugnant, for the Court muſt take notice of the demiſe of the king; that is the deſcription of the treſpaſs, and a treſpaſs done *contra pacem regis* could not be given in evidence: Indeed a verdict would have aided it. 16 & 17 *Car.* 2.

12. Green *verſus* Goddard.

[.... Ann. B. R.]

Where in entering H.'s cloſe, there is only force in law, H. cann t lay hands on the treſpaſſer before requeſt to depart; otherwiſe where there is actual force. 3 Salk. 308. 6 Mod. 227, 260. 2 Vent. 75. 1 Saund. 35.

TRESPASS, aſſault, and battery laid on the firſt of *October*, 3 *reg.* The defendant, as to the *vi & armis*, pleaded *non cul.* And as to the reſidue ſays, that long before, *viz.* on the 13th of *September*, a ſtranger's bull had broke into his cloſe, that he was driving him out to put him in the pound, and the plaintiff came into the ſaid cloſe, *& manu forti impedivit ipſum ac taurum præd. reſcuſſiſſe voluit, & quod ad præveniend. &c. ipſe idem defend. parvum flagellum ſuper querentem molliter impoſuit, quod eſt idem reſiduum, &c., abſque hoc quod cul. fuit ad aliquod tempus ante eundem* 13 *diem.* The plaintiff demurred. Mr. *Eyre* for the plaintiff argued, that they ſhould have requeſted him to go out of the cloſe. 19 *H.* 6. 31. 11 *H.* 6. 23. 2 *Ro. Treſp.* 547, 548, 549., and that *flagellum molliter imponere* is repugnant. 1 *Sid.* 4. Laſtly, The traverſe is ſhort, and no anſwer to the time after. 1 *Leon.* 307. 3 *Cro.* 87. 1 *Ro. Rep.* 406. *Et per Cur.* There is a force *in law*, as in every treſpaſs *quare clauſum fregit*: As if one enters into my ground, in that caſe the owner muſt requeſt him to depart before he can lay hands on him to turn him out; for every *impoſitio manuum* is an aſſault and battery, which cannot be juſtified upon the account of breaking the cloſe in law, without a requeſt. The other is an *actual force*, as in burglary, as breaking open a door or gate; and in that caſe

2 Brownl. Ent. 260. 3 Lev. 113. Rep. B. R Temp. Hard. 358. Com. Dig. Pleader, 3 M. 16.

caſe it is lawful to oppoſe force to force; and if one breaks down the gate, or comes into my cloſe *vi & armis*, I need not requeſt him to be gone, but may lay hands on him immediately, for it is but returning violence with violence: So if one comes forcibly and takes away my goods, I may oppoſe him without any more ado, for there is no time to make a requeſt.

2dly, *Powell*, J. held, that the attempt to take and reſcue the bull was an aſſault on his perſon, and a taking from his perſon; for if *H.* is driving cattle on the highway, and one comes and takes them from him, it is robbery, which cannot be without a taking from his perſon; *quod non fuit negatum*. *Vide* 29 *H.* 6. 66. 2 *Ro.* 549. *placito* 11. 1 *Ro. Rep.* 19.

Taking cattle from H. is a taking from his perſon. 3 Inſt. 69. Hale P. C. 73. Str. 1015. Rep. B. R. Temp. Hard. 113.

* 3dly, They held the *quod eſt idem reſiduum* good without a traverſe, and therefore no traverſe was neceſſary; [*Vide* 1 *Saund.* 8.] and conſequently it is no matter though it be ſhort, for here it goes only to the time; where *quod eſt idem* avers it to be the ſame. *Et per Holt*, C. J. Where a traverſe goes to the matter of a plea, *&c.*, all that went before becomes inducement, and is waived by the traverſe; but where a traverſe goes to the time only, what was ſet out in the plea before does not become bare matter of inducement, nor is it waived by the traverſe. *Sed adjournat*, Mr. *Eyre pro quer.* Mr. *Brydges pro def.*

Where traverſe goes to the matter, all before is inducement and waived; otherwiſe where to time only.

* [642]

13. Cockcroft *verſus* Smith.

[Paſch. 4 Ann. B. R. 1 Ld. Raym. 177. S. C. ſtated at the end of the caſe of Cook and Beal.]

IN treſpaſs for an aſſault, battery, and maihem, defendant pleaded *ſon aſſault demeſne*, which was admitted to be a good plea in maihem. But the queſtion was, What aſſault was ſufficient to maintain ſuch a plea in maihem? *Holt*, C. J. ſaid, that *Wadham Wyndham*, J. would not allow it if it was an unequal return; but the practice had been otherwiſe, and was fit to be ſettled: That for every aſſault he did not think it reaſonable a man ſhould be banged with a cudgel; that the meaning of the plea was, that he ſtruck in his own defence: That if *A.* ſtrike *B.*, and *B.* ſtrikes again, and they cloſe immediately, and in the ſcuffle *B.* maihems *A.*, that is *ſon aſſault*; but if upon a little blow given by *A.* to *B.*, *B.* gives him a blow that maihems him, that is not *ſon aſſault demeſne*. *Powell*, J. agreed; for the reaſon why *ſon aſſault* is a good plea in maihem,

Son aſſault demeſne, a good plea in maihem where the firſt aſſault was violent. S. C. 6 Mod. 230, 263. Rep. A. Q. 43, 52. Holt 699.

1 Sid. 240. 1 Rol. 19. 1 Wilſ. 5.

maihem, is, becauſe it might be ſuch an aſſault as endangered the defendant's life (*a*).

(*a*) In the principal caſe *Holt* directed the jury to find for the defendant. In Ld. *Raymond*, the firſt aſſault is ſtated to be tilting the form on which the defendant ſat; in *Rep. A.* 2. (11 *Mod.*) that the plaintiff ran his finger towards the defendant's eye.—The maihem was biting off the plaintiff's finger.

14. Newman *verſus* Smith & al.

[Trin. 5 Ann. B. R.]

Treſpaſs for entering the plaintiff's houſe and aſſaulting him. Aſſaulting and menacing his ſervants may be laid by way of aggravation. But muſt not make ſeveral counts of it. 6 Mod. 127. Vide ante 593, 594. 1 Salk. 119. S. C. Holt 699, 700. 2 Cro. 123. Mod. Caſes 127, 149.

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TRESPASS *de eo quod* the defendants *tiel jour & ann apud W.* upon the plaintiff *inſult. fecer. & ipſum verberaver., &c. Ita quod de vita, &c., & domum ipſius quer. apud W. præd. adtunc & ibidem freger. & intraver. & quer. in quiet. uſu & occupatione domus præd. diſturbaver. & impediver. necnon in præd. quær. & filium ſuum & M. N. & R. N. filias præd. quer. & E. N. ſervam ſuam minas de verberatione eorum adtunc & ibidem impoſuer. & ipſos injuriis & gravaminibus, viz. inſult. & affraiis adtunc & ibidem effecer. Et alia enormia, &c.* Upon not guilty it was found for the plaintiff; and Mr. *King* moved in arreſt of judgment upon 2 *Cro.* 501., that the maſter could not maintain treſpaſs for beating his ſervant or children without ſpecial damage, which ought to be ſpecially ſhewed. Mr. *Eyre* anſwered, and ſo it was reſolved, that the action was for the breaking and entry, and the farther deſcription is only to ſhew the Court how enormous that treſpaſs was; and the plaintiff could not recover damages for loſing the ſervice of his children or ſervant, nor could that be given in evidence; becauſe the plaintiff might have a proper action for that purpoſe: But the circumſtances mentioned might be proved in evidence to aggravate damages for the defendant's treſpaſs by breaking and entering. And whereas it was ſaid, *ibidem* refers to the vill, and it ſhould be *in domo prædict.*, it is plain the *adtunc* ties it to the ſame time, and then it could not be at a different place at the ſame point of time.

Ante 640. pl. 10. Vide ac. Str. 61. Bull. N. P. 89.

15. Layton *verſus* Grindall.

[Paſch. 8 Ann. B. R.]

Treſpaſs for entering his houſe and taking ſeparal. claves pro

TRESPASS for entering the plaintiff's houſe and taking *ſeparales claves pro apertione oſtiorum domus præd.* Upon not guilty pleaded, the plaintiff had a verdict, and

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it was objected, that the taking of each key was a diſtinct treſpaſs, and might require ſeveral anſwers, and the kind and number ought to be aſcertained. *Vide Playter's* caſe, 5 *Co.* 34. 1 *Vent.* 53. 2 *Vent.* 262. But to this it was anſwered and reſolved, that the keys are ſufficiently aſcertained by reference to the houſe. *Vide Al.* 2. *Sty.* 43. 1 *Vent.* 114. 2 *Cro.* 485.

apertione oſtiorum domus, &c. good without ſhewing number. Vide 2 Str. 167. 2 Ld. Raym. 1410. 3 Wilſ. 292.

16. Anonymous.

[Paſch. 8 Ann. B. R.]

TRESPASS for taking his cattle. The defendant pleaded that he was poſſeſſed of a cloſe for a term of years, and the cattle treſpaſſed therein, *&c.* The plaintiff demurred, and judgment was given for the defendant, though he ſhewed no title, but juſtified upon a bare poſſeſſion. And this difference was taken by *Holt*, C. J. Where the action is tranſitory, as treſpaſs for taking goods, the plaintiff is foreclоſed to pretend a right to the place; nor can it be conteſted upon the evidence who had the right; therefore poſſeſſion is juſtification enough: But in treſpaſs *quare clauſum fregit* it is otherwiſe, becauſe there the plaintiff claims the cloſe, and the right may be conteſted.

Where the treſpaſs is tranſitory the plaintiff cannot pretend a right to the place, therefore the defendant may juſtify by poſſeſſion only. Bul. N. P. 89. 4 Mod. 419. Carth. 10. 2 Mod. 70. 3 Mod. 132.

Southby verſus Eaton, Mich. 16 Geo. 2. B. R. In error ſame point adjudged.—Note to 5th edition.

Trial.

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Vide 7 Co. 2, 3, 4, 7, &c. 9 Co. 30, 31, 32, &c.

1. Anonymous.

1 Mod. 55.

[Paſch. 5 W. & M. B. R.]

A Cauſe cannot be tried at bar where action is laid in *London*, by reaſon of their charter.

Trial at bar. Vide ante 625. poſt. 648, 649. Str. 854.

But nota. The great cauſe of Lockyer verſus the Eaſt India Company was tried at bar, Mich. 2 Geo. 3. by a ſpecial jury of merchants of London, the privilege being waived, 2 *Wilſ.* 136.

2. Smith *verſus* Brampſton.

[Mich. 7 Will. 3. B. R. 1 Ld. Raym. S. C. named Smith *verſus* Frampton.]

New trial was denied in caſe for negligently keeping his fire. 5 Mod. 87. S.C called Smith verſus Crumpton.

CASE for negligently keeping his fire; verdict *pro def.* Though the verdict was againſt evidence, a new trial was denied, becauſe it is a hard action; yet *note;* Action againſt the hundred for a robbery, verdict *pro def.*, and new trial granted. 1 *Sid.* 58. (*a*)

(*a*) The principles upon which granting new trials depends, are ſtated very clearly in 3 *Bl. Com.* ch. 24. and in the caſe of *Bright* v. *Eynon*, 1 *Bur.* 390. In that caſe it was ſaid by *Denijon*, J. "That it would be difficult, perhaps, to fix an abſolutely general rule about granting new trials, without making ſo many exceptions to it as might rather tend to darken than explain it; but the granting a new trial muſt depend upon the legal diſcretion of the Court, guided by the nature and circumſtances of the particular caſe, and directed with a view to the attainment of juſtice." In order to induce the Courts to grant a new trial, it is not ſufficient that a cauſe is of value or importance, but it muſt alſo involve a doubt; although value frequently weighs in granting a rule to ſhew cauſe, *Vernon* v. *Hankey*, 2 *T. R.* 113. Where complete and ſubſtantial juſtice has been done, a new trial will not be granted, though the judge who tried the cauſe may have been miſtaken in point of law; as where an action was brought by a perſon for a violent aſſault on her niece, who lived with her, *per quod ſerv. amiſit*, and the judge held that the aunt ſtood *in loco parentis*, whereon large damages were given;—the plaintiff undertaking to pay the damages to the niece, and the niece not to proceed in an action which ſhe had brought for the aſſault, the rule for a new trial was diſcharged. *Edmonſon* v. *Machell*, 2 *T. R.* 4. So where a perſon brought an action on a promiſſory note given by his wife's father in conſideration of marriage; and it appeared that the plaintiff being under age, and, having no parent or guardian, was married *by licence*, and the wife, when the plaintiff came of age, was lying *in extremis* in her death-bed, and died in three weeks afterwards, the judge left it to the jury to preſume a ſubſequent marriage by banns, and the verdict being for the plaintiff, a rule for a new trial was diſcharged, *Wilkinſon* v. *Payne*, 4 *T. R.* 468.

In *Farewel* v. *Chuffey* and others, 1 *Bur.* 54. Lord *Manſfield* ſaid, that a new trial ought to be granted to attain real juſtice, but not to gratify litigious paſſions on every point of *ſummum jus*, and cited ſeveral of the caſes which are reported under this title (1). In theſe caſes the verdicts were againſt evidence and the ſtrict rule of law, but the Court would not give a ſecond chance to a hard action, or an unconſcionable defence. Accordingly new trials were refuſed in *Macrow* v. *Hall*, 1 *Bur.* 11. which was an action for a treſpaſs reported to be ſufficiently proved, but trifling, frivolous, and vexatious; *Burton* v. *Thompſon*, 2 *Bur.* 664. being an action for a libel in which the charge was proved, but the injury appeared very inconſiderable; *Marſh* v. *Bower*, 2 *Bl.* 851. an action for words, wherein ſmall damages ſhould have been given; and *Reavely* v. *Manwaring*, *Walker*, and others, 3 *Bur.* 1306. where the defendant *W.* ſent a preſs-gang to take ſome apprentices of the plaintiff's

(1) Pl. 2, 3, 5, 11, 18, 34.

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by their own conſent, but appeared to act with good intentions. *Vide* alſo *Norris* v. *Tyler*, *Cowp.* 37.

A new trial will not be granted for a miſtake in the proceedings, 2 *Str.* 1131. *Leeman* v. *Allen*, 2 *Wilſ.* 160. *Mather* v. *Brinker*, 2 *Wilſ.* 243.; nor where the verdict could not be ſupported according to the pleadings or form of action, but the ſame effect might have been had upon other proceedings at law or in equity. *Vide* *Goſlin* v. *Wilcock*, 2 *Wilſ.* 302. *Foxcroft* v. *Devonſhire*, 2 *Bur.* 936. *Sampſon* v. *Appleyard*, 3 *Wilſ.* 272. *Aylett* v. *Lowe*, 2 *Bl.* 1221. *Goodtitle* v. *Bailey*, *Cowp.* 597, 601.

It was formerly a prevalent rule, that there ſhould be no new trial when there was evidence on both ſides; but in *Norris* v. *Freeman*, 3 *Wilſ.* 38. where a writing, purporting to be a releaſe, appeared to be atteſted by two witneſſes, one of whom was called, and the other not, and there was contradictory evidence as to the hand-writing of the party, a new trial was granted, as the other atteſting witneſs ſhould have been called; and the Court held, that there were many caſes where new trials would be granted, notwithſtanding there was evidence on both ſides. The point does not ſeem to be much regarded in modern practice. The Courts will not grant a new trial becauſe the judge who tried the cauſe, or themſelves, might have drawn a different concluſion from the jury with reſpect to any matters of fact, if the evidence was proper to leave to the jury concerning ſuch fact, *Aſhley* v. *Aſhley*, 2 *Str.* 1102. *Anon.* 1 *Wilſ.* 22. *Swain* v. *Hall*, 3 *Wilſ.* 45. *Hankey* v. *Trotman*, 1 *Bl.* 1. *Camden* v. *Cowley*, 1 *Bl.* 418. Whether there be any evidence is a queſtion for the judge, whether ſufficient evidence is for the jury, *Carpenters Company* in *Shrewſbury* v. *Hayward*, *Doug.* 374. But a new trial will be granted if the jury, upon the facts proved, find a verdict contrary to law, as where they found a verdict for the inſured againſt an underwriter, though a material fact was not diſcloſed, *Hodgſon* v. *Richardſon*, 1 *Bl.* 463. So where they found that the holder of a note had uſed due diligence to obtain payment from the maker, when the Court thought otherwiſe, it being a queſtion of law; and alſo upon the ſame verdict being given a ſecond time, *Tindal* v. *Brown*, 1 *T. R.* 167. *Vide* *Pillans* v. *Van Mierop*, 3 *Bur.* 1363. The Courts will alſo grant a new trial if a point has been improperly left to the conſideration of the jury; as, whether a loan to ſave a perſon from immediate failure, with no other proſpect but the chance of being repaid, was fraudulent, *Foxcroft* v. *Devonſhire*, 2 *Bur.* 930. 1 *Bl.* 195. Whether by the cuſtom of merchants an indorſement of a bill to *J. S.* (not adding *to his order*) reſtrained the general negotiability of the bill, it being a matter of law, and clearly and fully fixed, *Edie* v. *the E. I. Com.* 2 *Bur.* 1216. 1 *Bl. Rep.* 295. Whether the charter of a corporation did or did not refer to and adopt antecedent uſage, (the conſtruction of charters belonging to the Judge or Court,) *Corporation of Liverpool* v. *Goligbtly*, *E.* 33 *G.* 3. *B. R. MS.* So when it was left to a jury, 1ſt, Whether a party's name to an inſtrument was forged; 2d, Whether, ſuppoſing it not to be forged, it was obtained by fraud without her knowing the contents and effect, when there ſhould have been an expreſs direction that the circumſtances of the caſe ſpoke fraud apparent, *Bright* v. *Eynon*, 1 *Bur.* 390.

A new trial will not be granted if there is a bill of exceptions depending on the ſame point, unleſs the party applying will waive the bill of exceptions, *Fabrigas* v. *Moſtyn*, 2 *Bl.* 929. If there are two contrary verdicts, the party againſt whom the laſt is given is not by any law or practice entitled to a third, *Parker* v. *Anſel*, 2 *Bl.* 963. A new trial will not be granted in a writ of right, unleſs the verdict is flagrantly wrong, *Tyſſon* v. *Clerk*, 2 *Bl.* 941. The certificate of the judge reſpecting the matter of fact as it appeared before him at the trial, is concluſive, *Rex* v. *Poole*, *B. R. Hard.* 23. *Vide* 5 *Bur.* 2667.

It was formerly the rule only to grant new trials upon the merits on payment

of coſts, except in particular caſes; but it is now conſidered as a matter generally in the diſcretion of the Court. But when the judge is miſtaken in point of law (1); or the jury find a verdict contrary to his direction as to the matter of law (2); or the plaintiff refuſes to ſubmit to a nonſuit, contrary to the opinion of the judge, and a verdict is found for him (3); or a verdict is given properly for the plaintiff on one count, and improperly againſt him upon another (4); or the verdict has been obtained by concealing a witneſs for the adverſe party (5); or by any improper artifice (6); a new trial is granted without coſts.

In the King's Bench, if a new trial is granted without any thing being ſaid reſpecting the coſts of the former, and the ſame verdict is given upon the ſecond trial as the firſt, the coſts of the ſecond only are allowed, *Maſon* v. *Skurray*, *Doug.* 438 *Schulbred* v. *Nutt*, n. *ibid.* *Hankey* v. *Smith*, 3 *T. R.* 507; but in the Common Pleas, if two concurrent verdicts are given, the party ſucceeding is allowed the coſts of both trials; if the ſecond differs from the firſt, the coſts only of the ſecond, *Parker* v. *Wells*, *H. Bl.* 639. n. *Trelawney* v. *Thomas*, *H. Bl.* 641. Where the matter in diſpute is ſmall, a new trial will not be granted unleſs it can be done without compelling the party applying to pay coſts, *Jackſon* v. *Duchaire*, 3 *T. R.* 553.

(1) *Rice* v. *Shute*, 2 *Bl.* 695. *Buſcall* v. *Hogg*, 3 *Wilſ.* 146. *Ratkham* v. *Jeſſop*, *id.* 338. *Vale* v. *Bayle*, *Comp.* 297. *Harris* v. *Butterly*, *Comp.* 485. *Goodright* v. *Saul*, 4 *T. R.* 359. (2) *Jackſon* v. *Duchaire*, 3 *T. R.* 553. (3) *Pockin* v. *Pawley*, 1 *Bl.* 670. (4) *Edie* v. *E. I. Comp.* 2 *Bur.* 1216. 1 *Bl.* 295. (5) *Montpeſſon* v. *Randle*, *B. N. P.* 328. (6) *Anderſon* v. *George*, 1 *Bur.* 352.

3. Smith *verſus* Frampton.

[Mich. 7 Will. 3. B. R.]

New trial. Vide poſt. pl. 34.

IN *caſe* for negligently keeping his fire, *per quod* the plaintiff's houſe was burnt; the verdict was for the defendant: And after great debate and conſideration a new trial was denied; becauſe it is a hard action, and the jurors are judges of the fact: And yet *Holt*, C. J. declared, he was not ſatisfied with that verdict; *quære*, whether the the ſame caſe with the precedent? (*a*)

(*a*) *Vide* note to the preceding caſe.

4. Anonymous.

[Paſch. 8 Will. 3. B. R.]

New trial. Vide poſt. pl. 7, 8, 33, &c.

THE Court never, or very rarely, grants new trials in actions for words. *Per Holt*, J. C. (*b*)

(*b*) *Vide Barnes* 229, 233. *Com. Pleader*, R. 17.

5. Smith *verſus* Page.

[Mich. 8 Will. 3. B. R.]

IN *ejectment* the plaintiff was a mortgagee, and claimed by ſurrender, whereas the land was not copyhold; and the defendant claimed only by a voluntary conveyance. The verdict was for the plaintiff, and the Court would not ſet it aſide, and grant a new trial againſt the honeſty of the cauſe (*a*).

No new trial againſt the equity of the cauſe. Poſt. pl. 11. 1 Mod. 2. S. C. Comb. 387.

(*a*) *Vide* note to *Smith* v. *Brampſton*, *ſupra pl.* 2.

6. Hatchell *verſus* Griffiths. [645]

[Mich. 8 Will. 3. B. R.]

ISSUE was joined in *Trinity term* 1695, and notice then given for trial next aſſizes, but no farther nor other proceeding till *Trinity* vacation 1696, and then the plaintiff gave a new notice of trial, *viz.* fourteen days notice for next aſſizes, when he accordingly tried the cauſe and had a verdict; but becauſe there was no proceeding within a year after the firſt notice, it was ſet aſide: *Sed nota;* Notice within the term had been a proceeding within the year, and made notice for fourteen days good notice of trial (*b*).

Notice of trial. See 6 Mod. 29, 57. 1 Mod. 1. Ante 457.

(*b*) In *Bogg* v. *Roſe*, 2 *Str.* 211. it was ſettled on conſideration that where a term's notice of trial is required, the notice muſt be given before the eſſoign-day. A term's notice is not neceſſary when the defendant has delayed the proceedings by injunction, *Boſworth* v. *Philips*, 2 *Bl.* 784. *Hayley* v. *Ryley*, *Doug.* 71.; nor where proceedings have been ſtayed by agreement for a certain time, *Watkins* v. *Haydon*, 2 *Bl.* 762.; nor where the proceedings have been delayed at the defendant's requeſt, *Bland* v. *Darley*, 3 *T. R.* 530.

7. Anonymous.

[Mich. 8 Will. 3. C. B.]

S. C. 1 Salk. 273. 2 Salk. 222.

A New trial was granted becauſe the counſel were abſent, not thinking the cauſe would come on, and no defence was made; but a like motion was denied in *B. R. per Holt*, C. J. Alſo in one *Coppin*'s caſe, a cauſe came on at ſeven in the morning, and an old witneſs could not riſe to be there time enough; but it was denied, unleſs he would make affidavit of what he knew, and would anſwer, ſo that the Court might judge of it, and how it was material. Fitzg. 40. Str. 691.

New trial for the abſence of counſel or evidence. Q. Vide 6 Mod. 22, 222, 242. Fareſt. 156. Poſt. 653. 2 Saund. 336. Mod. Ca. 22. 1 Bl. Rep. 298. 3 Bur. 1385. Note to pl. 16.

8. Dent *verſus* The Hundred of Hertford.

[Mich. 8 Will. 3. B. R.]

See Fareſt. 31, & 37.

A New trial was granted upon affidavit, that the foreman declared the plaintiff ſhould never have a verdict whatever witneſſes he produced (*a*).

(*a*) If the jury caſt lots for the verdict, it will be ſet aſide, *Hale* v. *Cove*, 2 *Str.* 642.; but the Court will not receive an affidavit of the fact from the jurymen themſelves, *Vaſie* v. *Delaval*, 1 *T. R.* 11. *Vide Comyns* 525. *Bemb.* 51. *Barnes* 438. 2 *Bl.* 1299.

9. King *verſus* Burdett.

[Mich. 8 Will. 3. B. R. 1 Ld. Raym. 148. S. C.]

Jury after going from the bar ſent for an act of common council given in evidence, and new trial denied.

A New trial was moved for upon affidavit, that the jury took an act of common council out with them, and that printed libels were ſpread againſt the defendant; and it was denied: For as to the firſt it differs from the Lady *Ive*'s caſe, where they took a map of one ſide, which was evidence on neither ſide: But this was an act of neither ſide, and evidence on both; but admitted to be irregular. *Et per Holt*, C. J. So if a jury eat at their own charge, it is fineable, but that verdict ſhall ſtand; otherwiſe if at the charge of one of the parties, and the verdict is found for him. *Vide Mo.* 599. (*b*)

(*b*) With reſpect to the ſecond point, *Holt* obſerved, that it was not fixed upon the informers, and if the delivery of papers by a ſtranger were ſufficient to avoid the verdict, the caſe would never be decided. *Vide* the report in Ld. *Raymond*. If libels are publiſhed with intent to influence the jury and the public, it is a ſufficient cauſe to poſtpone the trial, *Rex* v. *Gray*, 1 *Bur.* 510. *Rex* v. *Joliffe*, 4 *T. R.* 287.

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10. Saliſbury *verſus* Proctor.

[Hill. 8 Will. 3. B. R.]

Trial refuſed to be put off till ſuit in the Spiritual Court determined. S. C. 5 Mod. 324. 3 Salk. 130. Vide 1 Bl. 404. 2 Bur. 511. 4 Bur. 2257.

IN an action by an adminiſtrator the Court was moved to put off the trial, till a ſuit pending in the Spiritual Court concerning the right of adminiſtration was determined, which was to come on; which was denied *per Cur.*; for we cannot take notice of ſuits in the eccleſiaſtical courts.

11. Deerly *verſus* The Ducheſs of Mazarine.

[Hill. 8 Will. 3. B. R. 1 Ld. Raym. 147. S. C.]

UPON *non aſſumpſit* pleaded, the jury found for the plaintiff, though the ducheſs gave good evidence of her coverture; and the Court would not grant a new trial, becauſe there was no reaſon why the ducheſs, who lived here as a feme ſole, ſhould ſet up coverture to avoid the payment of her juſt debts (*a*).

New trial not granted for miſtake in point of law againſt the honeſty and equity of the cauſe. Ante, pl. 5. S. C. Ante 116. Comb. 402.

(*a*) From the reports, *ante* 116. 1 Ld. *Raym.* 147. it appears that the Court thought the coverture ſufficiently anſwered in point of law.

12. Thermolin *verſus* Cole.

[Hill. 8 Will. 3. B. R.]

IF the defendant appears and makes defence, he ſhall never have a new trial for want of due notice.

No new trial for want of notice after defence made. Ant. 428, 435. S. C. Ante 417.

13. Dominus Rex *verſus* Bear.

[Paſch. 9 Will. 3. B. R. 1 Ld. Raym. 414. S. C.]

UPON an indictment for a libel, the defendant was by verdict acquitted; Mr. Attorney-general moved for a new trial, but it was denied: And the Court ſaid, that anciently it was never done in criminal caſes where defendants have been acquitted; latterly, where it has been a verdict obtained by fraud or practice, as ſtealing away witneſſes, *&c.* it has been done, but never yet was done merely upon the reaſon that the verdict was againſt evidence. *Poſtea Mich.* 10 *W.* 3. *B. R. Per Holt*, C. J. In indictments of perjury we never do it, becauſe the verdict is againſt evidence; but if you prove a trick *, as no notice, *&c.*, it is otherwiſe. *Vide* 1 *Lev.* 9, 124. *Ne ſerra, ſi le def. ſoit acquit, alit. s'il ſoit convict.* (*a*)

Indictment for libel, defendant acquitted, and new trial denied. N. B. Fareſt. 31 & 37. S. C. Ante 324, 417. 3 Salk. 226. Carth. 407. Caſes B. R. 218. Holt 422.

* Or ill practice. Poſt. 649.

See 2 *Saund.* 336. *The defendant in error took out a record of niſi prius, and proceeded to trial at the firſt aſſizes after iſſue joined; yet held good, and a new trial denied.*

(*a*) In *Rex* v. *the Pariſh of Silverton*, 1 *Wilſ.* 298. after an acquittal on an indictment for not repairing a highway, a new trial for miſdirection or over-ruling evidence was refuſed; new trials being never allowed where the defendant is acquitted in a criminal caſe.

The trial of an indictment for making a partial rate having been poſt-

poned till after the trial of a feigned iſſue, to aſcertain whether the rate was partial, and a verdict being given on the iſſue for the defendant, which was alleged to be againſt evidence, the Court refuſed to grant a new trial, becauſe it was within the ſame reaſon as if it had been upon a criminal proſecution, *Rex* v. *Prued*, 4 *Bur.* 2227.

In *Mattiſon* v. *Allanſon*, 2 *Str.* 1238. *Fonereau* v. ———, 3 *Wilſ.* 59. new trials on account of the verdicts being againſt evidence were refuſed on penal actions; but in *Wilſon* v. *Raſtall*, 4 *T. R.* 753. it was ruled that a new trial might be granted in a penal action where the judge had excluded admiſſible evidence. *Jervois q. t.* v. *Hall*, 1 *Wilſ.* 17. was held not to be law ſo far as it proceeded on a contrary principle.

In *Norris* v. *Tyler*, *Cowp.* 37. the Court refuſed a new trial after a verdict for the defendant in an action for a malicious proſecution, as the ſuit was of a criminal nature.

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14. Turbervil *verſus* Stamp.

[Mich. 9 Will. 3. B. R.]

No motion for new trial after motion in arreſt of judgment. S. C. Ante 13. Comb. 459. Carth. 425. Skin. 681. Caſes B. R. 151. Holt 9.

H. Shall not move for a new trial after motion in arreſt of judgment; but after a motion for a new trial he may move in arreſt of judgment. So it is of a writ of inquiry; after motion in arreſt of judgment the defendant cannot move for a new writ (*a*). Weſt *verſus* Cole, *Mich.* 10 *W.* 3. *B. R.* The ſame point was held in *C. B. Paſch.* 8 *W.* 3. Philips *verſus* Crabb.

(*a*) After motion in arreſt of judgment a new trial may be granted for miſbehaviour of the jury, *Philips* v. *Fowler*, *Com.* 525.; or where, on the report of the trial of an indictment enough appeared to raiſe an inclination in the Court to think the defendant ought not to have been convicted, *Rex* v. *Gough*, *Doug.* 797.

15. Starr *verſus* Wade.

[Paſch. 10 Will. 3. B. R.]

LESSOR brought trover againſt the leſſee, for trees cut down; yet becauſe the leſſee did it in trenching, and the plaintiff had thereby greater advantage, though the jury found for the defendant, yet the Court would not grant a new trial.

16. Wits *verſus* Polehampton.

[Mich. 10 Will. 3. B. R.]

New trial for omiſſion of the party refuſed. 1 Salk. 273. 6 Mod. 222.

IT was moved for a new trial, becauſe the defendant having pleaded a compoſition, had forgot to carry down witneſſes to prove the ſubſcribers' hands; and the motion

motion was denied, becauſe the debt was honeſt. And *Holt*, C. J. remembered where debt on a bond was brought againſt an heir, who pleaded *riens per diſcent*, but the verdict went againſt him by omitting to bring the ſettlement to the trial; and the Court being moved, refuſed to grant a new trial, becauſe it was an honeſt debt (*a*).

(*a*) *Per* Lord *Mansfield*, *Edie* v. *E. I. Comp.* 1 *Bl.* 298. The ſuggeſtion of ſurprize is not in all caſes a reaſon for a new trial, but in particular caſes it may be. In *Spong* v. *Hog*, 2 *Bl.* 802. the defendant might have given evidence in mitigation, which his counſel thought it prudent to omit; but which procured a verdict for him in another cauſe at the ſuit of the ſame plaintiff: this was held no ground for a new trial. In *Giſt* v. *Maſon*, 1 *T. R.* 84. it was contended at the trial that certain policies were on an illegal trade; but the judge being of opinion that they were not ſo on the face of them, directed a verdict in ſupport of them; and a motion for a new trial, to let the defendants into evidence to prove the trading ſo notoriouſly illegal that the plaintiff muſt have known it, (which was not offered, on a preſumption that the jury muſt have drawn that concluſion,) was refuſed; as the defendant made the application to ſupply his own negligence, when it was evident that he was not taken by ſurprize at the trial.—So in *Forteſcue* 40, *anon.* a ſimilar application on behalf of a party who had made a miſtake on the trial in a point of evidence, which would have encountered the evidence given againſt him, which miſtake was diſcovered ſince the trial, was refuſed. *Vide Rogers* v. *Stephens*, 2 *T. R.* 718. where Ld. *Kenyon* ſaid, it would be extremely dangerous to grant a new trial on a ſuggeſtion that the party will make out a better caſe on a ſecond trial. In *Cooke* v. *Berry*, 1 *Wilſ.* 98. and *Price* v. *Brown*, *Str.* 691. new trials were refuſed to be granted on affidavits of the falſity of the defence which had been made, and that the plaintiff took the plea to be a ſham one, or that no defence was expected. In *Regina* v. *Corporation of Helſton*, 10 *Mod.* 202. it was held, that if a point of law be ſtarted by the judge, and the counſel do not take it up, but inſiſt on other facts, which are found againſt them, there ought not to be a new trial on the point of law. A diſcovery, after the trial, that a witneſs examined on the other ſide was intereſted, is not a ſufficient ground for a new trial, but it may weigh as a circumſtance where the merits are doubtful, *Turner* v. *Pearte*, 1 *T. R.* 717.

A new trial was granted in a caſe where the defendant's attorney ſwore that the defendant had gone abroad before *E.* term, (the cauſe being tried at the ſittings after that term,) and that ſince the trial he had diſcovered, in a memorandum-book of the defendant, a receipt ſigned by the plaintiff, which was ſet forth *verbatim*. *Vide Broadhead* v. *Marſhall*, 2 *Bl.* 955. So where an action was brought for 6000 pagodas, alleged to be depoſited by the plaintiff with the defendant, which was ſworn to by ſome *Daniſh* ſailors, and the defendant always denied the whole ſtory, but was not able to contradict the proof at the trial, but moved for a new trial, on the ground that the whole was a fiction, ſupported by perjury, which he could not be prepared to anſwer; that ſince the trial many circumſtances had come out to ſhew the ſubornation of the witneſſes; a new trial was granted after a very ſtrict ſcrutiny; *Fabrilius* v. *Cook*, 3 *Bur.* 1771.

A verdict was ſet aſide when a material witneſs for the defendant concealed himſelf in the plaintiff's houſe, *Montpeſſon* v. *Randle*, *Bull. N. P.* 328. So where the defendant, having bought goods from the plaintiff, paid him with the promiſſory note of a third perſon, to whom the plaintiff repeatedly gave time till he failed, and the plaintiff

brought an action on the note and for goods ſold, the diſpute being, which party ought to bear the loſs; but at the trial the plaintiff only proved the ſale of the goods, and refuſed to produce the note, though he had it in Court; and the defendant not having given notice to produce it, could not prove it by parol; this being an unfair advantage, contrary to equity and good conſcience, *Anderſon* v. *George*, 1 *Bur.* 352.

17. Anonymous.

[Mich. 10 Will. 3. B. R.]

New trial or writ of inquiry not granted for too ſmall damages, unleſs where there is a trick. Comb. 17, 170.

IN covenant to pay a ſum certain, *viz.* 100 *l.*, and a grant that upon default it ſhould be lawful for the covenantee to enter and take the profits, the defendant pleaded entry and *prizal del profits* in bar, and judgment was for the plaintiff upon demurrer, and upon the writ of inquiry the jury gave damages, and upon motion a new writ of inquiry was awarded; for debt might have been brought upon this covenant; and this is not like an iſſue where the jury are to give no more damages than are proved: But here the jury are to give the whole, unleſs the defendant proves ſomething in mitigation, which was not done in this caſe; therefore though the common rule holds, *viz.* that no new trial, or new writ of inquiry, ſhall be for too ſmall damages; yet there being a contrivance in this caſe, it differs (*a*).

(*a*) The Court refuſed to grant a new trial where only 5 *s.* damages had been given in an action for a malicious proſecution, and held that there could be no new trial granted on that account, *Barker* v. *Dixie*, 2 *Str.* 995.; or to ſet aſide an inquiſition in an action for maliciouſly ſuing out a commiſſion of bankrupt againſt the plaintiff, and maliciouſly holding him to bail for 1020 *l.* whereon the jury only gave 5 *l.* damages, though it was proved that the coſts of ſuperſeding the commiſſion amounted to upwards of 30 *l.* *Mauricet* v. *Brecknock*, *Doug.* 509.

But a new inquiry awarded for too ſmall damages, where there is a miſtake in point of law made by the ſheriff, as where a perſon told the plaintiff he could prove a debt, and after the jury were ſworn refuſed to give evidence, and the ſheriff thought he could not adjourn, whereupon nominal damages were given, *Markham* v. *Middleton*, 2 *Str.* 1259.; or where the jury have miſtaken the law, (the plaintiff and *J. S.* having each depoſited 200 *l.* with the defendant on a contract, which *J. S.* not performing, the plaintiff ſued for his depoſit, and the jury, on a notion that the defendant could not pay the money without the conſent of both parties, having given nominal damages,) *Woodford* v. *Eades*, 1 *Str.* 425. *Vide Hayward* v. *Newton*, 2 *Str.* 940. *Tatton* v. *Andrews*, *Barnes* 448. *Anon.* 12 *Mod.* 347.

18. Sparks *verſus* Spicer.

[Hill. 10 Will. 3. B. R.]

ONE was ordered by the judge of aſſize to be hanged in chains; the officer hung him *in privato ſolo*; the owner brought treſpaſs; and upon not guilty the jury found for the defendant, and the Court would not grant a new trial, it being done for convenience of place, and not to affront the owner.

New trial rarely granted in hard actions.

4 T. R. 468. Note to Smith v. Brampſton, ſupra pl. 2.

19. Lord Sandwich's *Caſe*.

[Trin. 11 Will. 3. B. R.]

WHERE there is value or † difficulty, we are bound of common right to grant trials at the bar. *Inquiſitiones de groſſis & pluribus articulis, quæ magna indigeant examinatione, capiantur coram juſticiariis de Bancis. Stat. Weſt. 2. c. 30. Per Holt*, C. J. Yet *Trin. 1 Ann.* it was denied, becauſe the plaintiff was poor, unleſs the defendant would agree to take *niſi prius* coſts. *Et poſtea, ſcil. Trin. 4 Ann. B. R.*, between the truſtees of my Lady *Sandwich* and my Lord *Sandwich*, though the eſtate was 3000 *l. per annum*, a new trial at bar was denied, becauſe the title of the leſſor of the plaintiff being from the defendant himſelf, there would be nothing to do but to prove the executing of a conveyance.

Trial at bar, where to be granted or denied. Vide pag. 625, 644, 649, & 651. 1 Vent. 64. S. C. Holt 702.

Vide Doug. 437. (420.) 1 T. R. 363. Str. 479. And. 271. Barnes 447.

† The word *or*, here, ſhould be *and*. Per Cur. Com. B. Trin. 2 Geo. 3.

20. Argent *verſus* Sir Marmaduke Darrell.

[Hill. 11 Will. 3. B. R. 1 Ld. Raym. 514. S. C.]

IN *ejectment* after a trial at bar, Serjeant *Wright* moved for a new trial, becauſe the verdict was contrary to evidence; the Court thought ſo too. *Rokeby* was for it on the caſe in *Style*, *cæteri contra*; for *per Holt*, C. J. The reaſon of granting new trials upon verdicts againſt evidence at the aſſizes is, becauſe they are ſubordinate trials appointed by *Weſt. 2. c. 30.*, *ubi de paucis articulis & facilis eſt examinatio*; and there have been new trials anciently, as appears from this: That it is a good challenge to the juror, that he hath been a juror before in the ſame cauſe; but we muſt not make ourſelves abſolute judges of law and fact too; and there never was a new trial after a trial at bar in ejectment, but in caſe of ill practice*; for the plain-

New trial after trial at bar refuſed in ejectment, becauſe not concluſive. Vide poſt. 650. pl. 27. Ante 646. pl. 13. N. B. Fareſl. 31 & 37. Comb. 18, 75. S. C. Carth. 507. Holt 702. Andrews 315. Vide note to pl. 27. infra.

* Or a trick.

tiff may bring a new ejectment: Upon this a new trial at bar was denied in Sir *Richard Temple*'s case, where the jury found a point of law on the statute of bankrupts, against the opinion of the Court (*a*).

(*a*) New trials in ejectment are not usually granted where there is a verdict for the defendant; otherwise if there be a verdict for the plaintiff: for in that case the defendant must part with the possession before a new ejectment can be brought. *Vide* 1 *Bl. Rep.* 348. 4 *Bur.* 2224.

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21. Anonymous.

[Hill. 11 Will. 3. B. R.]

1 Vern. 156. Trial per pais 226, 227, 242.

IN *assumpsit* for money won at play, the trial shall not be stayed till an indictment pending for the cheat be tried.

22. Anonymous.

Trial not put off for suit pending in the Ecclesiastical Court on the same matter. R. ac. ante pl. 10. 4 Mod. 8.

IN *assumpsit* the issue was, married or not married, and the same point was pending and ready to be determined in the Spiritual Court: And it was held no cause to put off the trial, for the Court cannot take notice of that.

23. Turner *versus* Barnaby.

[Pasch. 1 Ann. B. R.]

When trial at bar to be moved for. Vide ante 625, 644, 648, & post. 651. Fifteen days notice before a trial at bar.

IF *H.* would have a trial at bar in *Easter term*, he ought to move for it in *Hilary term*; if in *Michaelmas term*, he ought to move for it in *Trinity term*, except where lands lie in *Middlesex*; and anciently there was no other notice given of such trial, but the rule in the office; but now there must be fifteen days notice. *Per Holt*, C. J. (*b*)

(*b*) There are *dicta* in the books that there cannot be a trial at bar in an issuable term; but the case of *Goodtitle ex dem. Revett* v. *Braham*, was tried at bar in *Hilary* term, 32 *Geo.* 3. 4 *T. R.* 497.

S. P. Farel. 53, 64. Vide 6 Mod. 222, 242.

24. Anonymous.

[Mich. 1 Ann. B. R.]

New trial for misdirection. 2 Wilf. 269. † Or allow, or over-rule evidence.

A New trial shall be granted if the judge of *nisi prius* misdirect the jury †, because those trials are subject to the inspection of the Court. *Per Holt*, C. J. 7 Mod. 64.

25. Clerk *verſus* Udall.

S.C. Fareſt. 106.

[Mich. 1 Ann. B. R.]

New trial for exceſſive damages, and the ſame damages given, and third trial refuſed. See 6 Mod. 22, 242. 1 Lev. 97. 1 Sid. 131. Comb. 17, 170.

UPON a trial at *niſi prius* the jury gave exceſſive damages, and for this cauſe a new trial was granted (*a*). The ſecond jury gave the ſame damages again, and a ſecond new trial was moved for, and denied, becauſe there ought to be an end of things; but ſeveral caſes were cited which the Chief Juſtice allowed, that where upon the ſecond trial the jury have doubled the damages, a third trial had been granted (*b*).

(*a*) In actions for *tort*, where the damages depend upon ſentiment and opinion, the Courts will not grant a new trial on the ground of exceſſive damages, unleſs it appears that they are flagrantly outrageous and extravagant. Therefore they have refuſed to interpoſe when 300*l.* was given for a few hours falſe impriſonment, *Leeman* v. *Allen*, 2 *Wilſ.* 160. *Huckle* v. *Money*, *id.* 205.; or 1000*l.* to an attorney for falſe impriſonment, by a king's meſſenger, for ſix days, *Beardmore* v. *Carrington*, 2 *Wilſ.* 246.; or 200*l.* to one merchant againſt another for a ſlight aſſault, accompanied by ungentleman-like behaviour, *Grey* v. *Grant*, M. P. 2 *Wilſ.* 252.; or 500*l.* againſt a cuſtom-houſe officer, for an unſucceſsful ſearch for prohibited goods, *Sharpe* v. *Brice*, 2 *Bl.* 942. *Vide* alſo *Benſon* v. *Frederick*, 3 *Bur.* 1845. where 150*l.* damages to a militiaman againſt his colonel for unlawful corporal puniſhment; *Fabrigas* v. *Moſtyn*, 2 *Bl.* 929. where 3000*l.* in falſe impriſonment; *Leith* v. *Pope*, 2 *Bl.* 1327. where 1000*l.* for malicious proſecution; *Gilbert* v. *Burtonſhaw*, *Cowp.* 230. where 400*l.* for the like injury; *Ducker* v. *Wood*, 1 *T. R.* 277. where 150*l.* for an aſſault,—were held not exceſſive damages; but in all the preceding caſes it was aſſerted, that the Court were not precluded from granting a new trial for exceſſive damages, where they were manifeſtly unjuſt, and an evidence of paſſion or partiality in the jury.

In *Wilford* v. *Berkeley*, 1 *Bur.* 609. where 500*l.* damages were given for *crim. con.* againſt a clerk with a ſalary of 50*l.* the Court refuſed to grant a new trial, and ſeemed to think that in *that* action it could not be done; and in *Duberly* v. *Gunning*, 4 *T. R.* 651., 5000*l.* damages being given in a ſimilar action, Lord *Kenyon*, and *Aſhhurſt*, J. thought a new trial could not be granted, there having been no precedent, though the damages, under the circumſtances of the caſe, were enormous. *Buller*, J. thought there ſhould be a new trial. *Groſe*, J. thought that the caſe did not require a new trial; but did not deny that a caſe of ſuch an action could exiſt which might warrant the interference of the Court. In *Jones* v. *Sparrow*, 5 *T. R.* 257. a new trial was granted for exceſſive damages (40*l.*) in aſſault; and Lord *Kenyon* ſaid, It muſt be remembered, that, although *Duberly* v. *Gunning* was decided after a very full diſcuſſion of the ſubject, the Court were not unanimous in their determination; but whether rightly or not decided, that is a caſe *ſui generis*, and cannot govern the preſent.

(*b*) *Vide Str.* 691. 2 *Wilſ.* 244. 1 *T. R.* 277. 4 *Bur.* 2108.

S. C. Fareſl. 84, 85. 2 Salk. 201. pl. 4. 3 Salk. 363. Holt 184.

26. *The Caſe of the Mayor and Aldermen of* Briſtol.

[Mich. 1 Ann. B. R.]

No new trial in inferior courts. 1 Salk. 148, 149. 396. Fareſl. 38.

IT was held by the Court, that a new trial cannot be granted in an inferior court; for they are not like trials by *niſi prius*, which are ſubordinate upon writs iſſuing out of this Court, over which the Court have authority and inſpection; but this was a new trial a year after the firſt, which the Court blamed (*a*).

(*a*) *R. Brooke* v. *Exeter, Str.* 113. that an inferior court could not grant a new trial for exceſſive damages; but where, after iſſue joined, or notice of trial given, there is a reference, and the plaintiff afterwards proceeds by ſurprize, ſuch Court may grant a new trial, *Jewell* v. *Hill, Str.* 499. *Street's Caſe, 7 Vin.* 24. In the latter it is ſaid, that though an inferior court cannot grant a new trial after a cauſe hath been fully heard, yet where a verdict is obtained through ſurprize, or by any irregularity, it may be ſet aſide. *Vide ac. Bayley* v. *Boorne, Str.* 337. *Rex* v. *Peters*, 1 *Bur.* 571. *Blaquiere* v. *Hawkins, Doug.* 378. In *Rex* v. *Urling, Fort.* 198. it was held, that ſuch Court might ſet aſide a writ of inquiry or judgment, though ſtrictly regular, if obtained by fraud or ſurprize; and in *Rex* v. *Peters* it was ruled, that a regular interlocutory judgment, though there appeared no fraud or ſurprize, might be ſet aſide in an inferior court, in order to let in a trial on the merits.

S. C. 1 Salk. 258. Ante 253. Fareſl. 70, 121, 156. Holt 263, 266.

27. Fenwick *verſus* Lady Groſvenor.

[Hill. 1 Ann. B. R.]

New trial denied after trial at bar. 5 Mod. 88, 350.

IN *ejectment* after a trial at bar, a new trial was moved for, on affidavits that ſeveral witneſſes abſented themſelves in *Holland*, by reaſon of a report ſpread abroad there, that one of the defendant's witneſſes was confined by impriſonment; but it was denied, becauſe it did not appear that the plaintiff did ſpread it, or occaſioned the ſpreading of it. The Court was diſſatisfied with the verdict, but cited *Croſs*'s caſe for a falſe return of a *mandamus* tried at bar, and by conſent of all ſides one point was to be found ſpecially, yet the jury found a general verdict, and the Court would not grant a new trial (*b*). It has never been done here but upon iſſues out of Chancery, which being only to ſatisfy the conſcience of the Chancellor, are not *ſtricti juris*. So a new trial was denied, *contra opinionem (ut videbatur) capital. juſticiar.* (*c*)

Gay & Croſs, Fareſl. 37. 6 Mod. 18, 22, 307.

(*b*) *Vide Rep. B. R. Temp. Hard.* 23.

(*c*) *Per* Lord *Manſfield, Bright* v. *Eynon*, 1 *Bur.* 395. Of late years new trials have been granted, not only after

trials

trials at *niſi prius*, but alſo after trials at bar; and it is at leaſt equally reaſonable to grant them after trials at bar, as after trials at *niſi prius*, (if the juſtice of the caſe demands it,) or indeed rather more ſo, as the latter muſt be done upon what could have actually and perſonally appeared to a *ſingle* Judge only; whereas the latter is grounded upon what muſt have manifeſtly and fully appeared to the whole Court. For inſtances of new trials after trials at bar, *vide Str.* 584. 2 Ld. *Raym.* 1358. 1 *P. Wms.* 212.

28. Aſhwin *verſus* Corbill.

[Mich. 2 Ann. B. R.]

A term's notice. Vide ante 624. 514. 6 Mod. 146. 1 Sid. 34.

IF a cauſe hath lain at iſſue four terms, and no proceeding, there muſt be a full term's notice of trial, excluding the term wherein iſſue was joined.

29. Lazier *verſus* Dyer.

S. C. ante 457. 6 Mod. 57.

[Mich. 2 Ann. B. R.]

Suing out a venire facias teſted the laſt day of the term, not a proceeding within term as to notice of trial. 1 Bl. Rep. 215, 287. 3 Bur. 1241.

IT came to be a queſtion, Whether the ſuing out of a *venire* or *diſtringas*, after the expiration of the four terms, was a proceeding within the term; becauſe it bears *teſte* the laſt day of the term, and has relation to the term? And the Court held it was not; for though it be legally a proceeding of the term, yet it is not ſo in fact. *Et nota*; Where it is an iſſue out of Chancery, notice of trial to the ſolicitor in that court is good; for as to this, they are but as one court.

30. Sir Samuel Aſtrey's *Caſe*.

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S. C. 6 Mod. 123.

[Hill. 2 Ann. B. R.]

Trials at bar not denied to officers of the court, or barriſters. Vide ante 625. 2 Keb. 133, 161. 1 Cro. 248. 1 Inſt. 424. 1 Sid. 407.

UPON a *ſcire facias* brought againſt Sir *Samuel Aſtry*, for his place of clerk of the crown in the court of King's Bench, and iſſue joined thereupon; Sir *Samuel Aſtry* moved that the iſſue might be tried at the bar. The attorney-general oppoſed it; but the Court ſaid a trial at bar was never denied to any officer of the Court, nor hardly to any gentleman at the bar: And though Mr. Attorney was never bound to conſent to a trial by *niſi prius* in the queen's caſe, yet they did not ſee how he could refuſe a trial at bar, where it was reaſonable to try it there; for the ſtatute *Weſt.* 2. *cap.* 3. is *atterminentur*, that they may be determined there, *quæ magna indigeant examinatione.*

S. C. 6 Mod. 194. 3 Salk. 381. Holt 705.

31. Way *verſus* Yally.

[Trin. 3 Ann. B. R.]

If the principal cauſe be within the juriſdiction, and an iſſue depending on foreign laws ariſes, it may be tried in the next county, and foreign laws given in evidence. See 1 Lev. 143. 6 Mod. 228. 1 Jon. 43, 44. 2 Saund. 238. Hob. 37. 1 Cro. 143, 183. 1 Co. 2. 1 Saund 238. 1 Vent. 59, 286. Hob. 233. 2 Cro. 76. 1 Inſt. 261. b.

Cowper 181. 7 Co. 2. a. Str. 776.

LESSOR brought debt for rent againſt his leſſee, upon a demiſe at *London*, of lands in *Jamaica*. The defendant pleaded to the juriſdiction of the Court, that the matter ought to be tried in *Jamaica*; and it was urged that the leſſor cannot bring debt here againſt the aſſignee of a term of lands in *Ireland*, and that if entry and ouſter were pleaded, it could not be tried here; and in this caſe the right of the plaintiff and defendant depends on foreign laws which cannot be given in evidence here. *Et per Cur.* Where an action is local it muſt be laid accordingly; therefore if the leſſor declares on the privity of eſtate, and that lies in *Ireland*, the action muſt be brought there, for the eſtate is local; therefore ſuch leſſor cannot maintain debt here againſt an aſſignee of a term in *Ireland*; for the action is founded on a privity of eſtate (*a*). Otherwiſe where it is founded on a privity of contract, which is tranſitory; as debt for rent by leſſor againſt leſſee; for that may be maintained where the land lies not. Here it is by the leſſor againſt the leſſee on the privity of contract; and if a foreign iſſue, which is local, ſhould happen, it may be tried where the action is laid; for that purpoſe there may be a ſuggeſtion entered on the roll, that ſuch a place in ſuch a county is next adjacent; and it may be tried here by a jury from that place, according to the laws of that country; and upon *nil debet* pleaded you may give the laws of that country in evidence.

(*a*) *Vide ac.* 1 *Wilſ.* 165.

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S. C. 1 Salk. 380. 6 Mod. 245. Rep. A. Q. 33.

Trial by proviſo cannot be in the caſe of the crown; nor niſi prius, unleſs by warrant from the Attorney-general. 6 Mod. 246, &c. infra.

32. Domina Regina *verſus* Sir Jacob Banks.

[Mich. 3 Ann B. R. 2 Ld. Raym. 1082. S. C.]

SIR *Jacob Banks* was indicted at the quarter-ſeſſions in *Berks*, and the indictment was moved hither by the proſecutor, and now both the proſecutor and defendant made up the record, took out proceſs, and carried down the cauſe to trial at the aſſizes; and the defendant put in his record firſt, tried it, and was acquitted: The proſecutor upon this moved for a new trial, and had it.

Et per Cur. 1ſt, Before the 5 & 6 *W. & M. c.* 11., and 8 & 9 *W.* 3. *c.* 33. *H.* indicted in any county might remove it into *B. R.* by *certiorari*, and never was bound by recognizance to try it, unleſs in *London* and *Middleſex*: that

that by this means the defendant was out of court, *& fine die*, and new proceſs was to be awarded, on which he might be outlawed, unleſs he came in *gratis*, which occaſioned great delay, and was the cauſe of making thoſe acts.

2dly, That removals by defendants are provided for, but removals by proſecutors are not within thoſe acts; and that this removal being before the plea pleaded, the defendant was out of court *& fine die*, but may come in *gratis*, or be brought in by proceſs; and in the laſt caſe on pleading ſhall give ſecurity to try it, which he is not obliged to do when he comes in *gratis*.

Upon removal of indictment by the proſecutor, if defendant comes in by proceſs, he ſhall give ſecurity to try.

3dly, That in civil actions the defendant ſhall never carry down a cauſe by proviſo, till there be a laches in the plaintiff; except in cauſes where the defendant is as a plaintiff, as in replevin, prohibition, *quare impedit*, [againſt the patron only,] which are to have return, conſultation, and writ to the biſhop.

In what caſes the defendant may carry down a cauſe by proviſo. 2 Lev. 5, 6, &c. infra. 6 Mod. 240. & 123. Savil. 2. 2 Sid. 336.

4thly, There can be no trial by proviſo in a cauſe of the crown, becauſe there can be no default nor laches, nor can the crown be compelled to try any cauſe by *niſi prius*; and therefore every cauſe of the crown in this court muſt be tried at bar, unleſs the attorney-general allows a warrant of *niſi prius*, which implies his conſent to try the cauſe in the country.

5thly, That as in indictments of treaſon or felony, if the attorney-general will delay, the Court may give the defendant leave to bring on the trial as they ſee fit (and ſo it has been done): So in indictments for miſdemeanors, as in this caſe; the defendant may in the firſt inſtance, by the conſent of the proſecutor, and leave of the attorney-general, carry down the cauſe to trial; but it ſhall not be allowed by ſurpriſe on the attorney-general, as here in this caſe, and alſo without conſent of the proſecutor, or any default in him.

6thly, It was ordered to be a rule hereafter, that when an indictment is removed hither by the proſecutor, the defendant ſhall not carry it down to trial without leave of the Court on motion. [653]

33. Highmore *verſus* Walker.

6 Mod. 247.

[Mich. 4 Ann. B. R.]

IN a cauſe to be tried at the ſittings, the defendant entered a *ne recipiatur*; and the queſtion was, Whether the plaintiff could go on at the next ſittings without a new notice? It was agreed, that if no *ne recipiatur* had been entered, there muſt have been two days notice. The clerks

Two days notice to be given after ne recipiatur at ſittings.

upon the principal queſtion thought no notice neceſſary; their reaſon was, becauſe the defendant himſelf had hindered the plaintiff's proceeding, and therefore ought at peril to attend the next ſittings. But *Holt*, C. J. *contra*. The notice fell to the ground with the trial: A rule was made, that where a *ne recipiatur* was entered, the plaintiff ſhall give notice the ſame ſittings, and before they are over, that he will proceed to trial the next ſittings: And it was ſaid, that if a cauſe be not entered two days before the ſittings, the defendant may enter a *ne recipiatur*.

34. Dunkly *verſus* Wade.

[Paſch. 5 Ann. B. R.]

Hard action. Vide ante 644, 648. pl. 18. Rep. B. R. Temp. Hard. 201. Note to pl. 2. ſupra.

IN *caſe* for negligently keeping his fire, a verdict was found for the plaintiff, and a new trial granted. But *per Cur.* Had a verdict been for the defendant, we would hardly have granted a new trial, becauſe it is a hard action.

S. C. Fareſt. 256, 157.

35. Ford *verſus* Tilly.

New trial not granted for defect of preparation. See 6 Mod. 22, 222, 242. Ante 645. 1 Salk. 258, 273. Hardr. 71, 821. 1 Wilſ. 98.

AN inquiry found four voluntary eſcapes, for which *Ford*, warden of the *Fleet*, forfeited his office. Iſſues hereupon were tried in *B. R.* at the bar. One eſcape was proved by a witneſs, who was aſked if he was never burnt in the hand for ſtealing a tankard? he anſwered, No (*a*). A new trial was moved for upon producing the record of the conviction, and the Court denied the motion, 1ſt, Becauſe it was a trial at bar (*b*). 2dly, It is no reaſon for a new trial that you for the defendant came not prepared; and the Chief Juſtice ſaid *Soam*'s caſe was a hard caſe. *Vide* 3 *Keb.* 365, 369. 2 *Lev.* 114. *Poſtea*, *Paſch.* 4 *Ann. B. R.*, between *Cockcroft* and *Smith*, that the party's evidence was not ready, was held no reaſon for a new trial, though at *niſi prius*: And a new trial was denied (*c*).

(*a*) The queſtion ſeems ſuch as a witneſs ought not to be aſked. Beſides, a perſon convicted of felony, who is admitted to his clergy, and burnt in the hand, is thereby re-enabled to be a witneſs. *Vide* 2 *Hawk.* ch. 46. ſ. 20, 21.

(*b*) *Vide* note to *pl.* 27.

(*c*) *Vide* note to *pl.* 16.

Trover and Converſion.

Ante 597. 1 Lev. 99. 2 Lev. 201. 3 Lev. 336. 5 Mod. 182, &c. 6 Mod. 151, 170, 212. Vide 4 Mod. 156. Yelv. 68.

1. Arnold *verſus* Jeffreyſon.

[Mich. 9 Will. 3. C. B. 1 Ld. Raym. 275. S. C.]

TROVER *de ſcripto ſuo obligatorio per quod tent. & obligat. fuit cuidam J. S.* In arreſt of judgment after verdict for the plaintiff, it was held good; for it might be given to the plaintiff, and ſo ſhall be intended, and then it was *ſcriptum ſuum;* and it is no abſurdity, though it were made by him to another; for it is only a deſcription of the deed.

Trover de ſcripto ſuo obligatorio, good S. C. 3 Salk. 247. Holt 498.

2. Hartford *verſus* Jones.

[Mich. 10 Will. 3. B. R. 1 Ld. Raym. 393. S. C.]

IN *trover* and *converſion* the defendant pleaded, that the goods were caſt away, and they ſaved and detained them till they were paid for their pains. On demurrer, *Holt*, C. J. held, that they might retain for payment, as a carrier for his hire; and ſalvage is allowed by all nations: He that ſerves another ought in reaſon to be paid for his ſervice; but the plea is naught; for if the detainer be lawful, he does not confeſs a converſion: I never knew but one ſpecial plea good in trover, *viz. Yelv.* 198. (*a*) And the rule was in the principal caſe, to waive the plea and plead not guilty. *Vide* 2 *Cro.* 68, 69. 3 *Cro.* 262.

Special plea in trover muſt confeſs a converſion. Lutw. 1538. 1 Mod. 244. S. C. 3 Salk. 366. Vide Cro. Eliz. 435. Latch. 185. 1 Rol. Rep. 1. 1 Keble 305. Hutt. 10. Ante 516.

(*a*) The plea in *Yelverton* was, that the defendant took the wine mentioned in the declaration for priſage due to the king. The following pleas in trover have been alſo held good: A former recovery in treſpaſs for the ſame goods, *Show.* 146.; a recovery in trover againſt a ſtranger, *Cro. Jac.* 73.; or againſt the defendant, 2 *Str.* 1078.; that an innkeeper detained a horſe for his meat, 2 *Bulſt.* 289.; the Statute of Limitations, *Lut.* 99. *Vide Bull. N. P.* 48.

3. Hartford *verſus* Jones.

[Paſch. 10 Will. 3. B. R. 1 Ld. Raym. 588. S. C.]

TROVER for twenty ounces of cloves and mace; after a writ of inquiry on a judgment by default, *Holt*, C. J. doubted whether it was good, becauſe it was not ſaid,

Trover for 20 ounces of cloves and mace, well, without ſhewing

how much of each, or that they were mixed, ill in detinue. Quær. Vide 5 Mod. 281, 324. 1 Lev. 48. 3 Lev. 18. 2 Lev. 85, 176. 2 Vent. 67. 3 Mod. 70. 4 Mod. 324. 5 Mod. 324. 1 Sid. 60, 445. 1 Lev. 48. Fareſt. 142. 1 Mod. 46. 1 Vent. 317. 2 Saund. 74.

ſaid, how much cloves and how much mace; or that it was ſo many ounces *commixt.*; but he ſaid theſe were incertainties, and that if this was compriſed in another action, this recovery would be a good plea in bar. In detinue, this would be ill for incertainty; for the ſheriff could not tell how much of one and how much of the other to deliver. The Court gave judgment for the plaintiff, without taking notice of another * exception, *viz.* that it was alſo *pro viginti parvis inſtrument. carpentar., vocat.* twenty ſmall carpenter's tools. 2 *Saund.* 74. 2 *Ven.* 78. *Style* 358, 360, 370, 419. 1 *Mod.* 289. 2 *Ven.* 77.

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4. Anonymous.

[Trin. 3 Ann. *Coram* Trevor, *C. J.* *At* niſi prius *at* Guildhall.]

Where trover will lie againſt a carrier. 1 Mod. 30, 31. Comb. 333. 1 Danv. 21. 6 Mod. 212. 2 Ld. Raym. 792.

TROVER lies not againſt a carrier for negligence, as for loſing a box, but it does for an actual wrong; as if he break it to take out goods, or ſell it. *Per Cur. Paſch.* 7 *W.* 3. *B. R.* And therefore denial is no evidence of a converſion, if the thing appears to have been really loſt by negligence; but if that does not appear, or if the carrier had it in cuſtody when he denied to deliver it, it is good evidence of a converſion. *Per Trevor*, C. J. (*a*)

1 Str. 576. 1 Wilſ. 328.

Where denial is a converſion. *Vide* 10 *Co.* 56. 1 *Cro.* 262. 1 *Lev.* 173. 1 *Danv.* 21. 2 *Mod.* 245. 3 *Mod.* 2. (1 *Mod.* 244.) 5 *Mod.* 426. 2 *Show. Caſ.* 148, 175, 213.

(*a*) *R. ac. Roſs* v. *Johnſon*, 5 *Bur.* 2825. that trover would not lie againſt a wharfinger from whoſe poſſeſſion goods had been ſtolen or loſt. It will lie againſt a captain of a ſhip for delivering goods againſt an expreſs direction to a wharfinger, on account of a claim of wharfage which is not made out, *Lucas* v. *Hay*, 4 *T. R.* 260. For the general nature of the action, *vide Cowper* v. *Chitty*, 1 *Bur.* 20. Note to 3 *Salk.* 367.

Tithes.

See 1 Mod. 229. 6 Mod. 261. 4 Mod. 336, &c. S. C. 4 Mod. 336 to 344.

1. Hick *verſus* Woodſon.

[Hill. 8 Will. 3. B. R. 1 Ld. Raym. 137. S. C.]

IN attachment *ſur prohibition*, the plaintiff declared of a cuſtom in ſuch a hundred, to pay no tithe for agiſtment of cattle barren. Iſſue was taken upon the cuſtom, and found for the plaintiff, but judgment was arreſted with this entry, *et quia apparet curiæ domini regis hic quod conſuetudo præd. nullius vigoris in lege exiſtit, ideo fiat conſultatio, &c. Et per Cur.*,

County or hundred cannot preſcribe in a non decimando for things titheable of common right; otherwiſe if not titheable of common right. Tithe of agiſtment of barren cattle due of common right. Vide Fareſt. 113, 137. 1 Saund. 141, 142. Carth. 392. Comb. 403. Skin. 560. Holt 671. Caſes B. R. 111.

1ſt, Tithe of agiſtment is due of common right, becauſe the graſs, &c. which is eaten, is *de jure* titheable, and muſt have paid tithe if cut at perfection. And the Court took this difference, *viz.*

That a hundred or a county cannot preſcribe in a *non decimando*, for a thing that is in its nature *de jure* titheable; for, as no one ſingle perſon, or his eſtate, can; no more, by the ſame reaſon, can the hundred, which conſiſts but of many ſingle perſons eſtates. *Vide March* 26. 1 *Ro. Ab.* 653.

But of things which in their nature are not titheable *de jure*, a hundred or county may preſcribe in a *non decimando*, becauſe they are diſcharged in ſuch caſe without a cuſtom to the contrary, and they do but inſiſt on their ancient right, and that cuſtom hath not prevailed againſt it: *Ergo* the caſe of wood, 1 *Ro. Ab.* 654. *Lit. Rep.* 152, 153., and the hearth-penny, which is but a *modus* for it, they allowed to be good law; becauſe wood is not in its nature titheable, nor within the reaſon of titheable things, which come not to perfection every year.

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4 Mod. 336 to 341. Lutw. 1316.

Fareſt. 113, 137.

Pal. 37. 2 Inſt. 645.

2. Hill *verſus* Vaux.

Vide 6 Mod. 261. S. C. called Leiceſter verſus Foy. Ante 554.

[Mich. 10 Will. 3. B. R. 1 Ld. Raym. 358. S. C.]

ON a ſuit in the Spiritual Court for tithe of milk, the plaintiff moved for a prohibition, ſuggeſting a cuſtom in the pariſh, that the 9th day of *May* at night, and the 10th day of *May* in the morning, the parſon was to have the whole meal's milk, and ſo every 9th and 10th night and

Carth. 461. S. C. Modus to pay a whole meal's milk ſuch a day, and every 9th and 10th night and morning af-

ter, till a young lamb yeaned be heard to bleat, in lieu of tithe of milk, ill. Modus to pay part of the very thing that is tithe, not good, unleſs payable in another manner. Lat. 222. 6 Mod. 261. Raym. 277. 1 Mod. 229. Caſes B. R. 206. Holt 672.

and morning, till a young lamb yeaned ſhould be heard to bleat, in lieu of all tithe of milk. And the caſe of thirty eggs, in lieu of all eggs, was cited 1 *Ro. Ab.* 648, 651. *Et per Cur.* A *modus* to pay one thing for another, or a part of the ſame thing in another manner, may be good; but a preſcription to pay part of the very thing that is tithe, can never be a good *modus*, unleſs payable in ſome other manner, ſo that the parſon has a benefit by it. 3 *Cro.* 609. 2 *Cro.* 47. 1 *And.* 799. *Mod.* 229. *Hob.* 250. *Raym.* 277. 3 *Bulſt.* 326. (*a*) As to the caſe of the thirty eggs, he is bound to pay that, whether he has hens or no, and he muſt pay it at a certain time. But by this *modus* the parſon may have nothing; as ſuppoſe a lamb be heard to bleat before the 9th of *May*.

(*a*) *Vide* alſo *Bunb.* 307.

3. The Archbiſhop of York *verſus* the Duke of Newcaſtle.

[Mich. 3 Ann. In Scacc.]

Modus of ten fleeces of wool and two lambs, for all tithe: Court divided whether good or not. Vide 1 Mod. 321.

H. Preſcribed to pay ten fleeces of wool and two lambs in lieu of all tithes; and *Price* and *Bury*, Barons, were of opinion this was an ill *modus*, becauſe it is one ſpecies of tithe for another, and there is great incertainty; for one fleece may be twice as big, and three times the value of another. *Vide* 2 *Lutw.* 1052. 3 *Cro.* 786, 276. *Mo.* 909. 1 *Ro. Ab.* 649. *Dy.* 149. *Hard.* 174. *Ward*, Chief Baron, and *Smith*, Baron, *contra*. 1ſt, A *modus* is nothing but a real compoſition, for or in lieu of tithes, or an annual profit certain and permanent; and they held that the payment of any one chattel for tithe, was or might be a good *modus* as well as money; for why might not the parſon originally agree to take ten fleeces for his tithe, as well as a penny? They admitted that payment of tithe of one ſpecies, or payment of a *modus* for one ſpecies of tithe, could not be a diſcharge as to another ſpecies; but they held that this was not a payment of tithe, nor a payment for a ſpecies of tithe; becauſe it was to be paid at all events, whether there be ſheep or no: And they denied the caſe of 1 *Ro. Ab.* 651., and held it no more uncertain than to pay a *modus* of ten cheeſes, which may differ vaſtly, both in nature, quantity, and value; and it tends to the diſquiet of the country to break in upon cuſtoms and uſages; and it ought not to be done but on plain and manifeſt reaſon.

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Payment of tithe of one ſpecies not a good modus for all. Cro. El. 446. Moor 277, 445. Lutw. 1048, 1051.

4. Startupp *verſus* Dodderidge.

[Paſch. 4 Ann. B. R. 2 Ld. Raym. 1158. S. C.]

A *Modus* to pay 2 *s.* in the pound of the improved rent in lieu of all tithes, was held naught; for that is to riſe and fall as the land is let, and the parſon cannot know it: And though a cuſtom to pay the double value for a fine may be good, yet that ariſes to a man's contract, which ſhall never be void where it may be reduced to any certainty, and differs from this caſe of a *modus*, which ought to be as certain as the duty, which is deſtroyed by it. *Holt*, C. J. *dubitante*, upon a motion for a prohibition (*a*).

Modus to pay 2 *s.* in the pound of the improved rent, ill. Modus ſhould be as certain as the duty deſtroyed by it. See Lutw. 1043 to 1053. &c. ſupra. Ante 551. S. C. Rep. A. Q. 60. Lilly Ent. 19.

(*a*) The *modus* was alſo held void on application to the Common Pleas and Exchequer. *Vide* the report in Ld. *Raymond*. The ſame *modus* was likewiſe held bad, 1 Ld. *Raym.* 696. *Vide* 3 *Atk.* 245. *Burn Ecc. Law*, 421.

Variance.

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Ante 434, 452.

1. Bragg *verſus* Digby.

[Paſch. 10 Will. 3. B. R.]

IN *caſe* on ſeveral promiſes by original, the defendant, without craving *oyer* of the writ, pleaded variance betwixt the writ and the count, ſhewing particularly wherein: And the plaintiff demurred; and it was adjudged that the defendant ſhould anſwer over; for he ought to have demanded *oyer* of the writ before he could take advantage of the variance; becauſe though the writ is in court, [*the count*,] yet being not upon the ſame roll with the count, the defendant cannot plead to it without demanding *oyer* (*b*).

Variance between writ and count not pleadable without craving oyer of the writ. Oyer. Vide ante 497. and poſt. 701. 3 Lev. 236. 1 Saund. 118. 6 Mod. 303. S. C. Caſes B. R. 189. Andrews 76.

(*b*) *R. ac.* 2 *Wilſ.* 85, 295. But *oyer* as an original is not now granted, and the plaintiff may proceed as if it had not been craved, *Boats* v. *Edwards*, *Doug.* 227. *Vide Rex* v. *Amery*, 1 *T. R.* 150.

2. Holman *verſus* Borough.

[Trin. 1 Ann. B. R. 2 Ld. Raym. 791. S. C.]

ed dated in
: year of our
ird ſet forth
ith the year of
e king alſo, no
ariance.
Vide Cro. Jac.
261. 1 Ld.
Raym. 335.

IN *covenant*, the plaintiff declared of a deed of covenant, bearing date the 30th of *March anno Domini* 1701, *annoq; regni Willi. tertii nunc regis Angl., &c. decimo tertio*, and makes a *profert* of the deed, with a *cujus dat. eſt eiſdem die & anno:* Upon *oyer* craved, the deed was dated only thus, *viz.* the 30th of *March* 1701, wanting *anno Domini*, and likewiſe *anno regni*. And though it was demurred to for the variance, the Court held it no variance, for it was implicitly in the deed. *Vide* 41 *E.* 3. 23.

S. C. Far. 87.
Holt 200.

3. Incledon *verſus* Crips.

[Mich. 1 Ann. B. R. 2 Ld. Raym. 814. S. C.]

In debt, where the quantity of the duty depends upon the deed, variance is fatal, and cannot be helped by remittitur; otherwiſe where on matter extrinſic 1 Salk. 139. 1 Lutw. 459, 539. 2 Vent. 129. 1 Show. 8, 9. Cro. Car. 137, 436, 437. 1 Saund. 282, 285. Fateſl. 143, 148. 5 Mod. 213. 1 Sid. 407. Vide Bur. 2231. Doug. 6. 1 H. Bl. 249.

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Vide Str. 1089. Doug. 6. Bur. 2231.

IN *debt*, the plaintiff declared on a deed, whereby the defendant covenanted to pay the plaintiff 35 *l. per* hundred for every hundred of wood in ſuch a place, and that he delivered ſo many hundreds and one half, which came to 182 *l.* 10 *s.* The defendant demurred. *Et per Cur.*

There can be no apportionment, and the demand for the half hundred is demanding more than can be due by the contract; and then the queſtion was, Whether a *remittitur* could be entered for that, and judgment given for the reſt? *Et per Holt*, C. J.

* Where the ſum demanded depends on the deed itſelf, and on nothing extrinſical, as in caſe of debt or covenant to pay 20 *l.*, there can be no *remittitur*; for the variance is inconſiſtent with the deed upon which the duty that is demanded entirely depends; otherwiſe where it may be more or leſs by matter extrinſic; as in debt for rent, or in the caſe at bar; in that caſe, if more be demanded than is due, it may be remitted; for the variance is not inconſiſtent with the deed: And as the plaintiff is to recover on trial what appears on evidence to be due; ſo on demurrer he is to have judgment for no more than he ought to recover, and may remit the reſt. *Vide Hob.* 178. *Dy.* 65. *Yelv.* 66. 10 *H.* 6. 5. 1 *Saund.* 206, 286.

Vide ante 564, 630. 6 Mod. 42, 132. Far. 120, 121.

4. Chetley *verſus* Wood.

[Mich. 2 Ann. B. R.]

Recognizance in C. B. taken at a Judge's chamber pleaded as

IN *debt* upon a recognizance, the plaintiff declared as on a recognizance acknowledged in the court of Common Pleas, *coram G. Treby, mil. & ſociis ſuis; nul tiel record*

cord was pleaded, and the record produced was a recognizance taken before Mr. Juſtice *Nevil*, at his chambers in *Serjeants Inn*, and by him brought and delivered into court; and it was adjudged that the plaintiff has failed of his record: For the record is ſuch as it is entered upon the roll, and in pleading muſt be ſo deſcribed: Accordingly the court of King's Bench do enter all recognizances as taken in court, but the Common Pleas enter ſpecially; ſo that their recognizances bind from the caption, ours from the time of entry; alſo upon theirs a *ſcire facias* lies in either county; but on a recognizance in *B. R.* in the county of *Middleſex* only; therefore theſe differ in ſubſtance; and as to the uſage of declaring this way, which was inſiſted on, the Chief Juſtice ſaid it was againſt law.

taken in court; variance. Lutw. 1287. S. C. 3 D. 314. p. 6. Holt 612. Recognizance of bail in C. B. binds from the caption, in B.R. from the entry only. Mod. Caſes 42. S. C. 1 Cro. 312. Hob. 195. Aleyn. 12.

5. Roberts *verſus* Harnage.

[Mich. 3 Ann. B. R. 2 Ld. Raym. 1043. S. C.]

IN debt upon a bond, the plaintiff declared, *quod cum* the defendant *apud London.*, *viz. in paroch. beatæ Mariæ de Arcubus in warda de Cheape per ſcriptum ſuum obligatorium conceſſiſſet ſe teneri* to the plaintiff in 40 *l. ſolvend.* to the plaintiff, *&c.*; the defendant craved *oyer*, and the bond was to the plaintiff to pay 40*l.* to his attorney or his aſſigns; and was dated at *Port St. Davids* in the *Eaſt Indies.*

Bond to A. in 40l. ſolvend. to his attorney, declared on as payable to A. and no variance. S. C. 6 Mod. 228.

The defendant pleaded theſe variances in abatement, and upon demurrer the Court held,

1ſt, That the firſt was no variance; for payment to the plaintiff or his attorney is the ſame thing. The *teneri* made it a debt to the plaintiff, and in conſequence it may be paid to him; a *ſolvendum* to any body elſe would be repugnant. *Vide* 4 *Ed.* 4. 29. *Sid.* 295. 2 *Keb.* 81. But payment to the plaintiff's attorney or his aſſignee is the ſame thing.

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2dly, The ſecond variance was held fatal, though it was objected that the place was only uſed as a *venue*, for the dating made the bond local; and it is not a bond dated at *London*, becauſe there is an expreſs date at *Port St. Davids*; but the plaintiff might have declared, that the defendant *apud Port St. Davids* in the *Eaſt Indies*, *viz. apud London. in paroch.*, *&c.*, for that was only uſing *London*, *&c.* for a place of trial. *Broderick pro quer. Parker pro def.* (*a*)

1 Str. 612. Cowp. 178.

(*a*) A party is not bound to ſtate the material parts of a contract in words and letters; it will be ſufficient to ſtate the ſubſtance and legal effect, which is not liable to miſrecitals and literal miſtakes, *Briſtow* v. *Wright*, *Doug.*

7. Domina Regina *verſus* Dr. Drake.

[Mich. 5 Ann. B. R.]

Information for a libel, variance in the word *nor* for *not* held fatal upon evidence. See 6 Mod. 168. Raym. 74. Tenor imports a true copy. 1 Keb. 531. Fareſl. 101. Hob. 59. 1 Sid. 148, 153, 217. S. C. 3 Salk. 224. Rep. A. Q. 78, 84, 95. Holt 347, 349, 350, 425.

INFORMATION for that the defendant being evilly diſpoſed to the government, did make a libel, in which libel were contained divers ſcandalous matters *ſecundum tenorem ſequent.*, and in ſetting forth a ſentence of the libel, it was recited with the word *nor* inſtead of *not;* but *note*, the ſenſe was not altered thereby. The defendant pleaded not guilty; and this appeared upon evidence, a ſpecial verdict was found. *Et per Curiam*,

1ſt, *Cujus quidem tenor* imports a true copy. *Vide Reg.* 169. 8 *Co.* 78. *Co. Ent.* 508. 2 *Saund.* 121., *in hac quæ ſequitur forma*, 5 *Co.* 53., *tenor* is a tranſcript, and implies the very ſame.

2dly, They held that this was not a *tenor*, by reaſon of this variance; for *not* and *nor* are different; different in grammar and different in ſenſe. And *Powys*, J. held as to the point where literal omiſſions, *&c.* would be fatal, that where a letter omitted or changed makes another word, it is a fatal variance; otherwiſe where the word continues the ſame (*a*): And in the principal caſe, no man would ſwear this to be a true copy.

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In declaring for words ſpoken, variance in omiſſion or addition not material, if the words proved are actionable; otherwiſe in tenor of words written.

3dly, The Court held, that there was a difference between words ſpoken and words written; of the former there could not be a *tenor:* for there was no original to compare them with, as there is of words written; and though there have been attempts to plead a *quorum tenor* of words ſpoken, it has never been allowed; and therefore where one declares for words ſpoken, variance in the omiſſion or addition of a word is not material; and it is ſufficient if ſo many of the words be proved and found as are in themſelves actionable. *Vide Dy.* 75. 3 *Cro.* 503. *Hard.* 470. Otherwiſe in debt upon a bond; for upon *non eſt factum* any variance is fatal.

In pleading a libel may be ſet forth in hæc verba, or by the ſenſe and ſubſtance of it.

4thly, *Holt*, C. J. held, that in pleading there were two ways of deſcribing a libel or other writing, by the words or by the ſenſe: By the words, as if you declare of a libel *cujus tenor ſequitur, &c.*, or *quæ ſequitur in his Anglicanis verbis ſequentibus*, you deſcribe it by its particular words, of which each is ſuch a mark, that if you vary you fail in making good their deſcription. *Vide Dy.* 203. If a man bring treſpaſs *quare clauſum fregit*, and ſets forth abuttals and bounds, and fails in proving them, he is gone; and yet he needed not to have deſcribed it after that

(*a*) Cited and *r. acc. Comp.* 229. *Vide Str.* 229. *Doug.* 194.

manner.

manner. 2dly, You may deſcribe it by its ſenſe and meaning; thus it is a good information to ſhew, that the defendant made a writing, and therein ſaid ſo and ſo, tranſlating it into *Latin*; in which caſe, exactneſs in words is not ſo material, becauſe it is deſcribed by the ſenſe and ſubſtance of it.

Verdicts.

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Vide Co. Lit. 226. 1 Saund. 230. 2 Saund. 97, 171, 255. Raym 193. 5 Mod. 351.

1. Buxendin *verſus* Sharp.

[Paſch. 8 Will. 3. C. B.]

THE plaintiff declared that the defendant kept a bull that uſed to run at men; but did not ſay, *ſciens* or *ſcienter*, &c. This was held naught after a verdict; for the action lies not unleſs the maſter knows of this quality, and we cannot intend it was proved at the trial, for the plaintiff need not prove more than is in his declaration.

S. C. 3 Salk. 12. Vide 2 Str. 1023, 1264. Cowp. 826. Doug. 658.

2. Jenkins *verſus* Turner.

[Mich. 8 Will. 3. C. B. 1 Ld. Raym. 109. S. C.]

THE plaintiff declared that the defendant kept a boar *ad mordend. animalia conſuet.*, and knew of this habit, and that the boar did bite, &c. This was held good after verdict, though it was objected that theſe animals may be frogs or mice, &c., for we muſt intend there was proof of biting ſuch animals as will ſupport the action, otherwiſe the judge and jury would not have concurred in this verdict, whereby the plaintiff recovers damages: And as to another objection, *viz.* that the defendant cannot know what animals he is to defend againſt; it was anſwered, that no evidence can be given of killing any animals but what he has knowledge of.

Action for keeping a boar ad mordend. animalia conſuet. held well after verdict. 1 Show. 539. 1 Lutw. 899. S. C. 3 Salk. 13.

3. Acton *verſus* Eels.

[Mich. 8 Will. 3. B. R. Comyns 12. S. C. called —— and Blackall *v.* Heal and others.]

Damages given in treſpaſs laid at a time not come, it ſhall be intended another time was proved. Vid. 1 Mod. 292. (S. C. Cart. 389. 5 Mod. 286 6 Mod. 102.)

IN *treſpaſs* for aſſault and battery, and verdict for the plaintiff, it was moved in arreſt of judgment, that the time laid in the declaration was not yet come. *Et per Cur.* Then it is a time impoſſible, and the jury muſt be ſuppoſed to give damages for another treſpaſs; and it is as if no time had been alleged; otherwiſe if the time had been laid after the action, and before the verdict, for that ſhall be intended to be the treſpaſs that was given in evidence, and that was after the action brought; and ſo it is where it appears that the jury give damages for a time not come, as in 2 *Saund.* 169., where the contrary cannot be intended, 3 *Keb.* 304. in point. Judgment for the plaintiff. Then *Northey* moved that they might have leave to enter the judgment as of the preceding term, becauſe the plaintiff died ſince the verdict. *Curia*, Enter it as you can, but at your peril, we give no leave nor directions about it.

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Vide Doug. 61. 2 Bur. 1159. Gilb. C. B. 131.

4. Roe *verſus* Gatehouſe.

[Mich. 8 Will. 3. B. R. 1 Ld. Raym. 145. S. C.]

Incertainty in count cured by verdict. Vide 1 Lutw. 899. 1 Saund. 154, 155. 2 Saund. 171. 2 Vent. 141, 142, 196. Carth. 379. S. C. 1 Lutw. 234. 6 Mod. 227, 268, &c. Fareſt. 143. S.C. 5 Mod. 305. 3 Lev. 55. 1 Sid. 309. 1 Saund. 6, 7. Comb. 404. 1 Salk. 26. Str. 703. 2 Ld. Raym. 1526.

ASSUMPSIT, *quod cum* the defendant was indebted to him in 5 *l.* for money lent, and promiſed to pay; *cumq; etiam* at the requeſt of the defendant the plaintiff found horſe-meat for *J. S. ſuper ſe aſſumpſit*; and ſays not that the defendant *ſuper ſe aſſumpſit*. A verdict being for the plaintiff and entire damages, and a writ of error brought in *B. R.*, relying upon 3 *Cro.* 913. and *Noy* 50., for *J. S.* might as well be the perſon promiſing as the defendant; and the promiſe is the gift of the action; and an incertainty in that cannot be cured by intendment after verdict. *Sed per Cur.* It being ſaid poſitively at firſt, that the defendant *ſuper ſe aſſumpſit*, and then *cumq; etiam*, &c., the ſame nominative ſhall go to all the promiſes; and, by reaſon of the word *etiam*, it cannot be intended of a promiſe by *J. S.*, for he had not promiſed before. Judgment affirmed. *Vide Sid.* 292, 306. *Lutw.* 125. 3 *Co.* 703.

5. Prince *verſus* Molt.

[Paſch. 9 Will. 3. B. R. 1 Ld. Raym. 248. S. C.]

IN caſe the plaintiff declared, *quod cum quer.* 3 *Julii poſſeſſionat. fuiſſet de quodam clauſo prati prædict. defend.* 3 *Auguſti erexit novum molendinum & aquam currentem fecit inundare per quod inundavit clauſum ſuum prædict. per quod totum uſum & proficuum inde eodem ſecundo die Julii uſque tempus exhibitionis billæ prædict. amiſit:* Verdict *pro quer.*, and entire damages; but judgment was arreſted; for an erection on the 3d day of *Auguſt*, might make him loſe a particular gain or profit from the 2d day of *July*, as if he had laid in the meadow for hay. But by an erection on the 3d day of *Auguſt* he could never loſe *totam uſum & proficuum* from the 2d day of *July*: therefore he has recovered more damages than he ought, and this caſe is not to be diſtinguiſhed from *Moor* 887. *Hob.* 189.

Judgment arreſted becauſe more damages recovered than ought. Vide 1 Saund. 154, 155. 2 Saund. 171. 1 Vent. 10. Carth. 386. S. C. called Prince verſus Moultin. 2 Mod. 154. Comb. 442, 443. S. C. Caſes B. R. 131. Holt 192. Vide Doug. 656.

6. Eaſt *verſus* Eſſington. Mich. 1 Ann. B. R. [664]

Vide this Caſe, title *Bills of Exchange*. Vol. 1. pag. 130. pl. 14.

7. Crowther *verſus* Oldfield.

[Hill. 4 Ann. B. R. *Vide* this Caſe, title *Jeofails*. Vol. 1. pag. 364. pl. 5. 2 Ld. Raym. 1225. S. C.]

WHERE a verdict will aid a title defectively ſet forth, but not defective in itſelf.

8. Hadley *verſus* Stiles.

[Mich. 9 Ann. B. R.]

DEBT on a bill penal for 300 *l.* The defendant pleaded *nil debet*, and the plaintiff took iſſue thereon, and the jury found *nil debet* for 200 *l.*, and *debet* as to 100 *l.* Mr. *Lutwyche* urged, that this plea, iſſue, and verdict were immaterial, and that the debt could not be apportioned. *Et per Cur.* The plea was ill, but the verdict has made it good: We will intend 200 *l.* paid, and an acquittance under ſeal produced in proof thereof; and the jury may as well apportion here as in debt on a ſimple contract, where they may find *nil debet* for part. *Vide Mo.* 957. 1 *Rol. Rep.* 257.

In debt on ſingle bill and nil debet pleaded, the jury find nil debet to part and debet to the reſt, well after verdict. Vide 1 Mod. 292. 1 Show. 539. 3 Lev. 55. 2 Saund. 255, 308. 2 Will. 19.

Vide 1 Show. 3. 2 Lev. 117.

View.

1. Kempſtet *verſus* Deacon.

[Paſch. 8 Will. 3. C. B.]

A View is grantable, but that is only where the title is in queſtion.

2. Anonymous.

[Trin. 10 Will. 3. B. R.]

Method of proceeding in caſe of a view. 2 Saund. 254. 6 Mod. 217, 265. 1 Keb. 379, 418. 3 Keb. 103, 254, 425.

IT was ordered, that when in order to a view, the laſt juror is withdrawn, the plaintiff ſhall take out a new *diſtringas*, *amoto* the laſt man of the panel, to diſtrain the other twenty-three, with an *apponas etiam decem tales*. At the trial of this cauſe for want of a full jury upon the principal panel, ſome *tales-men* were ſworn and had the view, but the *diſtringas* was returnable as an original *diſtringas*, and ſo many of the principal panel left out, who were not at the view; of which the defendant complained, and would have ſet aſide the trial for irregularity; but becauſe no *venire* appeared to the Court, and the matter ſtood upon record as an original trial, and the want of a *venire* was helped by verdict; and becauſe the cauſe was tried by thoſe that were fitteſt, *viz.* thoſe who had the view; the Court would do nothing in it, but ordered the other courſe for the future.

3. Anonymous.

[Mich. 4 Ann. B. R.]

PER *Holt*, C. J. Before we make a rule for a view, the *venire facias* muſt be returned, and then we may make a rule, that ſo many of the panel ſhall view the premiſes (*a*).

(*a*) *Vide* ſtat. 4 & 5 *Ann. c.* 16. *ſect.* 8. 3 *Geo.* 3. *c.* 24. *ſect.* 8. *Bur.* 253.

Villeins and Villenage.

1. Smith *verſus* Brown and Cooper.

[2 Ld. Raym. 1274.]

Indebitatus aſſumpſit for a negro ſold. Q. Whether inheritances, or not? S. C. Holt 495.

THE plaintiff declared in an *indebitatus aſſumpſit* for 20 *l.* for a negro ſold by the plaintiff to the defendant, *viz. in parochia beatæ Mariæ de Arcubus in warda de Cheape*, and verdict for the plaintiff; and, on motion in arreſt of judgment, *Holt*, C. J. held, that as ſoon as a negro comes into *England*, he becomes free: One may be a villein in *England*, but not a ſlave. *Et per Powell*, J. In a villein the owner has a property, but it is an inheritance; in a ward he has a property, but it is a chattel real; the law took no notice of a negro. *Holt*, C. J. You ſhould have averred in the declaration, that the ſale was in *Virginia*, and, by the laws of that country, negroes are ſaleable; for the laws of *England* do not extend to *Virginia*, being a conquered country their law is what the king pleaſes; and we cannot take notice of it but as ſet forth; therefore he directed the plaintiff ſhould amend, and the declaration ſhould be made, that the defendant was indebted to the plaintiff for a negro ſold here at *London*, but that the ſaid negro at the time of ſale was in *Virginia*, and that negroes, by the laws and ſtatutes of *Virginia*, are ſaleable as chattels. Then the attorney-general coming in, ſaid, they were inheritances, and transferrable by deed, and not without: And nothing was done.

2 Vent. 4. Ante 411, 510. 3 Mod. 162.

2. Smith *verſus* Gould.

Vide 5 Mod. 186, 187. 2 Lev. 201. 3 Lev. 336.

[Mich. 4 Ann. B. R. 2 Ld. Raym. 1274. S. C.]

Trover lies not for a negro; but in treſpaſs quare captivum ſuum cepit, plaintiff may give in evidence that he was his negro. Differences between property in things having a natural exiſt-

TROVER for ſeveral things, and among the reſt *de uno Æthiope vocat.* a negro; and, on not guilty pleaded, verdict was for the plaintiff, and ſeveral damages; and as to the negro 30 *l.* And it was moved in arreſt of judgment, that trover lay not for a negro, for that the owner had not an abſolute property in him; he could not kill him as he could an ox. *Contra*, It was ſaid property implies the right of having and enjoying, and diſpoſing; but it does not always imply a power to deſtroy; that this power

ence and a civil exiſtence only. Vide ante 556, 637.

power holds in beaſts, fowl, and fiſh, which were made the property of mankind by the act of God, and have a natural exiſtence, but not in things incorporeal, which conſiſt *in jure tantum*; for this being a property *ex inſtituto* only, the owner has only a power according to the meaſure of this inſtituted right: And it was inſtanced in the caſe of a common, a way, and a ward. On a *ca. ſa.* the plaintiff has an intereſt in the body of the priſoner as a pledge not to ſell, but to keep, and it goes to the executors. *Hob.* 61. In a ſervant to work him; in a captive to ſell him. *Reg.* 102. *F. N. Br.* 88. *a. B. N. C.* 295. *Bro. Property* 38. 1 *H.* 6. *c.* 5. *in Raſt.* 219. *Cot. Abb.* 460. That the writ *de nativo habendo* muſt lay the explees of a villein in working and taxing him at will. *Co. Ent.* 406. That by the law of *Moſes* a man may be a ſlave, and a ſlave was a chattel, *his maſter's money*, *Exod.* 20, 21. That by the ſame reaſon there may be a *ſervus prædialis*, *i. e.* a *villein*. One may be a *ſervus perſonalis*, and that firſt a captive and afterwards a villein. *Hob.* 97. *Brownl.* 78. A villein in groſs is a chattel, for he is of a periſhable nature, and cannot endure for ever. So is *Fitz. Diſcontinuance* 16. *Br. Villein* 60. As villeins are regardant to land it is a different thing, and in that reſpect they are inheritances, and ſo are the charters. Every villein is intended in law regardant; the writ in the regiſter therefore ſuppoſes him to be *nativum ſuum*, but before he was a villein he was a captive, and then a chattel. Laſtly, It was inſiſted, that the Court ought to take notice that they were merchandize, and cited 2 *Cro.* 262. The caſe of monkeys, 2 *Lev.* 201. 3 *Keb.* 785. 1 *Inſt.* 112. If I impriſon my negro, a *habeas corpus* will not lie to deliver him, for by *magna charta* he muſt be *liber homo*. 2 Inſt. 45. *Sed Curia contra*, Men may be the owners, and therefore cannot be the ſubject of property. Villenage aroſe from captivity, and a man may have treſpaſs *quare captivum ſuum cepit*, but cannot have trover *de gallico ſuo*. And the Court ſeemed to think that in treſpaſs *quare captivum ſuum cepit*, the plaintiff might give in evidence that the party was his negro, and he bought him.

Servus prædialis and perſonalis. 3 Lev. 336. Hob. 283. Vide March 12. Raym. 16. Cro. Car. 19, 391, 545. Cro. El. 226, 545. Cro. Jac. 262, 463.

Viſne.

1 Lev. 149. 2 Lev. 237. Cro. Car. 278. Raym. 67, 417, &c.

1. Seaman *verſus* Ling.

[Mich. 6 Will. 3. B. R.]

IF the defendant be a barriſter, he may have the *viſne* changed to *Middleſex*. In *Trin.* 2 *Ann.*, *Wilcocks*, an attorney, was ſued by bill of privilege, and the action was laid in *Suffolk*; and upon motion the *venue* was changed into *Middleſex*; and *vide* 2 *Vent.* 47. If an attorney being plaintiff lay his action in *Middleſex*, the *venue* ſhall not be changed; otherwiſe if in *London* (*a*).

If the defendant be a barriſter or attorney, he may change the venue to Middleſex. See 1 Mod. 64. 2 Show. 242, 176. 1 Vent. 1, 11, 16, 29, 298.

(*a*) It is now fully ſettled, that a barriſter, attorney, or other privileged perſon, has no right as ſuch, when a defendant, to have the *venue* changed into *Middleſex*, *Pope* v. *Redfearne*, 4 *Bur.* 2027.; *Yeardley* v. *Roe*, 3 *T. R.* 573.; but when they are plaintiffs, the *venue* cannot be changed from *Middleſex* upon affidavit of the cauſe of action ariſing elſewhere, *Spelman*'s caſe, 1 *Wilſ.* 159. 1 *Bl.* 19. The privilege ſubſiſts though both the plaintiff and defendant are attornies reſident within the county to which the *venue* is attempted to be changed, *Pye* v. *Leigh*, 2 *Bl.* 1065.

2. Anonymous.

[Paſch. 8 Will. 3. B. R.]

PER *Holt*, C. J. The motion to change a *venue* ought to be within eight days after the declaration delivered; but this rule is not always ſtrictly adhered to. But, *Trin.* 7 *W.* 3. *B. R.*, it was ſaid by *Aſton*, one might move to change the *venue* at any time before judgment ſigned, which *Holt*, C. J. denied, ſaying, heretofore it was never granted after the rules for pleading were out.

When motion to change the venue ought to be made. Vide Str. 211. 1 Wilſ. 245.

3. The Duke of Norfolk *verſus* Alderton.

[Paſch. 9 Will. 3. B. R.]

A Motion was made to change a *viſne* in an action of *ſcandalum magnatum* upon the common affidavit, inſiſting on my Lord *Shaftſbury*'s caſe, 2 *Jo.* 192, 198., but it was denied; for in my Lord *Shaftſbury*'s caſe, it was on an affidavit of the vaſt intereſt he had in the city, and the unlike-

Viſne refuſed to be changed in an action of ſcandalum magnatum. Vide 1 Lev. 56, 149. 3 Keb. 33. 1 Lev. 307.

1 Vent. 364. 3 C. Carth. 400. Cafes B. R. 121. 2 Jon. 192. Skin. 40.

unlikelineſs of an impartial trial; but we will not deprive the plaintiff of that benefit the law gives him, of laying his action where he pleaſes, for the convenience of the defendant. *Vide* 1 *Lev.* 56.

Note; At common law, all actions were laid in the proper county, that there might be a jury *de vicineto.*

[669]

4. Anonymous.

[Mich. 10 Will. 3. B. R.]

Where evidence neceſſary to ſupport the action ariſes in two counties, the plaintiff may lay it in either. Vide infra. 7 Co. 2, 3, & 7, b. Raym. 33. 2 Lev. 178, 207, 394.

IN an *action on the caſe* againſt the drawer of a bill of exchange who lived at *Briſtol*, and drew the bill there, a motion was made to change the *venue*, but it was denied, for the perſon upon whom the bill was drawn lived in *London*, and there was the refuſal, and that muſt be proved to make the firſt drawer liable; for where evidence neceſſary to ſupport the action ariſes in two counties, the plaintiff may chuſe which he will; and this is the ground of the rule, that if the plaintiff will be bound to give ſome material evidence in the county where the action is laid, the Court will never change the *venue*. *Et Paſch.* 10 *W.* 3. *B. R.* in trover and converſion the defendant had leave to change the *venue*, and the plaintiff moved to ſet that aſide, offering to be bound to give evidence in the county where the action was laid. Upon inquiry the Court found the plaintiff was aſſignee of commiſſioners of bankrupts, and could prove the aſſignment in that county. *Per Holt*, C. J. The whole is tranſitory. *Et per Cur.* The converſion is the cauſe of action, and not the aſſignment; and you are in place of the commiſſioners, and the *venue* was according to the rule. And, *Paſch.* 12 *W.* 3. *B. R.*, it was held, that where a rule is made to change a *venue*, and afterwards the plaintiff would bring it back again, the rule muſt be, *dare aliquam evidentiam de materia in exitu*, in the county where the action was brought (*a*).

(*a*) When the *venue* has been changed upon the common affidavit from *Cumberland* to *London*, it cannot be brought back upon an affidavit that the cauſe of action was a promiſe to indemnify againſt becoming bail in *Scotland*, that the plaintiff's witneſſes reſide in *Scotland*, and are willing to come to *Carliſle*, but not further, and that there is no proceſs to compel their appearance, *Fegee* v. *Gale*, 1 *Wilſ.* 102.; nor on an affidavit that the cauſe of action aroſe where the *venue* is laid; there muſt be an undertaking to give material evidence there, *French* v. *Copinger*, *H. Bl.* 216.: Upon ſuch an undertaking the plaintiff muſt be nonſuited, unleſs he gives material evidence accordingly, *Santler* v. *Heard*, 2 *Bl.* 1031.; but the undertaking is complied with by proving a ſubſequent rule to pay money into court in the county where the *venue* is, *Watkins* v. *Towers*, 2 *T. R.* 275., or by proving a cauſe of action in a foreign country, *Gerard* v. *De Rebeck*, *H. Bl.* 289.

After

After the *venue* has been changed from *M.* to *L.*, and the cauſe has gone down to trial at *L.*, and been made a *remanet*, it may be rechanged to *L.* upon the uſual undertaking, *Bruckſhaw* v. *Hopkins*, *Cowp.* 409.

5. Dominus Rex *verſus* The Mayor of Oxford (*a*).

[Paſch. 13 W. 3. B. R.]

IN *caſe* for a falſe return, the action was laid in *Suffolk*, and the defendant moved it might be laid in *Middleſex*; and gave as one reaſon, that it would raiſe heats in the county. The Court inclined to do it, but the plaintiff inſiſted and would not conſent, and therefore nothing was done, becauſe he had a right to lay it in either county (*b*). Vide ſupra. Raym. 33. Lutw. 345. 5 Co. 2, 3, 4 & 7, b.

(*a*) *Qu. Orford.*

(*b*) In *Myleck* v. *Saladine*, 1 *Bl.* 480., 3 *Bur.* 1564., after a trial in the city of *Cheſter* for falſe impriſonment there, and a new trial granted, the Court changed the *venue* to the county of *Cheſter*, on account of its appearing that an impartial trial could not be had in the city. The uſual rule, when an impartial trial cannot be had where the *venue* is laid, and the cauſe of action aroſe, is to try the cauſe in the next county, caſe of *The Mayor, &c. of Briſtol*, 1 *Wilſ.* 77.; but the Court will not permit a ſuggeſtion that an impartial trial could not be had, to be entered, unleſs there appears a clear and ſolid foundation for it, *Rex* v. *Harris*, 3 *Bur.* 1330., 2 *Bl.* 378. If the next county is a county palatine, the *venire* is directed to the neareſt county where the king's writ runs, *Rex* v. *Cowle*, 2 *Bur.* 861.; *Rex* v. *Autery*, 1 *T. R.* 363.

Vide Mayor of Poole v. *Bennett*, *Str.* 874.; *Mayor, &c. of Briſtol* v. *Proctor*, 1 *Wilſ.* 298.

6. Crocket's *Caſe*.

[Trin. 3 Ann. B. R.]

THE plaintiff declared of a promiſe in *Staffordſhire*, and the declaration was delivered in *Eaſter-Term*. *Chetham* moved to change the *venue*. *Et per Holt*, C. J. (the motion being in *Trinity-term*,) Unleſs it appears upon the face of the declaration, that the plaintiff was not entitled to a plea to enter, we expect an affidavit when the declaration was delivered, that thereby the Court may be aſcertained. S. C. 6 Mod. 175. [670]

7. Sir Samuel Gerard's *Caſe*.

[Mich. 3 Ann. B. R.]

AN action of falſe impriſonment againſt the ſheriffs of *London* was laid in *Middleſex*, and upon the common affidavit a rule was made that the *venue* ſhould be changed Vide 1 Saund. 229. Raym. 33. Str. 874.

to

to *London*; but then it was ſaid that the officer of the Counter was ſubject to the ſheriffs, and ſo there could be no good trial, for which reaſon it was removed back to *Middleſex* (*a*).

(*a*) Where the *venue* has been changed upon the common affidavit, and it appears that an impartial trial cannot be had, as in a city on a bye-law of that city, or in a county upon an action for words ſpoken in the heat of an election, the rule for changing it will be ſet aſide, and it cannot be changed to an adjacent county where the cauſe of action did not ariſe, *Slaughter* v. *Bradock*, 4 *Bur.* 2447.; *Petyt* v. *Berkeley*, *Cowp.* 510.

8. Heathcoat's *Caſe*.

[Paſch. 4 Ann. B. R.]

Venue not changed in action againſt a lighterman, &c. for goods loſt. Vide 2 Lev. 307. 2 Sid. 87.

AN action againſt a lighterman for not delivering goods, was laid in *London*, where they were to be carried. It was moved to change the *venue*, becauſe the damage and neglect was in *Kent*; *ſed non allocatur*; for the neglect is tranſitory, and not material where it was, and the Court will never change a *venue* for a carrier, which is the ſame caſe; otherwiſe perhaps in deceit, or where there is an actual misfeaſance. *Sed per Holt*, C. J. *Mich.* 10 *W.* 3. *B. R. fuit dit*, that, in an action of eſcape, it is not the courſe to change the *venue* (*a*).

(*a*) An affidavit to change the *venue* from *L.* to *C.* muſt ſtate that the cauſe of action aroſe in *C.* and not in *L.*, or elſewhere out of *C.*, and is inſufficient if it omits *not in L.*, *Allen* v. *Griffiths*, 3 *T. R.* 495. *Vide Waddington* v. *Thelwell*, 4 *Bur.* 2452.; *Herring* v. *Durant*, 1 *Wilſ.* 178.

The Courts will not change the *venue* in an action on a libel in a newſpaper which is circulated and ſold in different counties, *Pinkney* v. *Collins*, 1 *T. R.* 571.; or in a letter ſent from one county to another, *Cliſſold* v. *Cliſſold*, *id.* 647.; *ſecus* when it is contained in a letter ſent from one place to another in the ſame county, *Freeman* v. *Norris*, 3 *T. R.* 306.; or from the county into which the *venue* is attempted to be changed, to a place abroad, *Metcalfe* v. *Markham*, 3 *T. R.* 652.

It is not in general changed in debt or an action on a ſpecialty, or bill of exchange, or promiſſory note, *Str.* 878. *Barnes* 491. 1 *Wilſ.* 41.; but in an action on a bond the *venue* was changed to the county where it was ſworn that the plaintiff's and defendant's witneſſes lived, *Foſter* v. *Taylor*, 1 *T. R.* 781.; but, in *Pole* v. *Horobin*, *n. ibid.*, the Court refuſed, in a ſimilar action, to change it to where the defence aroſe, with an offer to admit the execution of the bond; or from *G.* to *S.* in an action for running down a ſhip, the defendant's witneſſes living in *S.* and the plaintiff's in *G.*, *Flecke* v. *Godfrey*, *id. ibid.* That the action aroſe on a wager laid in *O.* reſpecting an event in *C.* is not a ſufficient cauſe againſt changing the *venue* from *M.* a third county to *O.*, *Shirley* v. *Collis*, 2 *Bl.* 940. *Vide French* v. *Copinger*, *H. BL* 216. *n.* to *pl.* 4. *ante*.

Whether a *venue* can be changed into *Wales* appears to be ſtill undecided. There have been many rules for the purpoſe made abſolute without oppoſition, *vide Pritchard* v. *Pugh*, *Doug.* 262.; but on account of the neceſſary

neceſſary form of the affidavit, it cannot be changed into the next *Engliſh* county, though the cauſe may be tried in ſuch county; *vide Waddington* v. *Thelwell*, 4 *Bur.* 2450.; *Moore* v. *Fernbaugh*, 1 *Wilſ.* 138.

It cannot be changed into one of the four northern counties before the ſpring aſſizes, *dict. ibid. Vide acc.* 3 *Bl. Com.* 294.

It may be changed into a county palatine, *Godfrey* v. *Philpot*, 2 Ld. *Raym.* 1418.; *Markham* v. *Norton*, cited 1 *Wilſ.* 222.

9. Knight *verſus* Farnaby & al.

[Paſch. 5 Ann. B. R. 2 Ld. Raym. 1253. S. C.]

MR. *Knight*, clerk of aſſize of the *Norfolk* circuit, brought an action of aſſault and battery againſt *Farnaby* and others, for a battery committed in *Kent*, and laid the action in *Middleſex*. Upon the common affidavit the *viſne* was changed, and, upon the motion of Mr. *Knight*, that rule was ſet aſide, and the *viſne* brought back again (*a*). *Et per Holt*, C. J. In ſtrictneſs of law, an action for a tranſitory matter, as battery is, may be laid any where. If by law the place were material, the defendant might give in evidence, as he does in criminal proſecutions, that the battery was done in another county: However it is now allowed and become the courſe of the Court, to change the *venue* for the defendant upon the common affidavit; a practice which, as he had heard by old practiſers, came up firſt in King *James* the Firſt's time; but that rule had never obtained in caſes of privileged perſons, as barriſters, &c., who are to attend at *Weſtminſter*; and therefore have the liberty of laying their actions in *Middleſex*: So it was held in the caſe of Mr. *Thompſon* againſt *Scroggs*. The plaintiff is an officer, he is bound to attend the aſſizes at *Norfolk*, and to attend at *Weſtminſter* to return the *poſtea*'s. By the ſtatute of *Weſtminſter juſticiarii habeant clericos ſuos irrotulantes*; and in *Dyer*, upon a queſtion who ſhould return the *poſtea*'s in caſe both the juſtices of aſſize died before the day in bank, it was held the clerk of aſſize ſhould return them: Therefore he is clerk to the judge of aſſize, and a miniſter here above to attend upon trials ordered by ſuperior courts, upon writs of *niſi prius* iſſuing out of thoſe courts. *Et per Powell*, J. The privilege extends to judges' clerks, as well as to ſerjeants at law, barriſters, and attornies, for they are bound to be in *Middleſex* to attend their maſters, and ſo is the clerk of aſſize; that the clerk of aſſize was the clerk of the judge of aſſize; and ſince the ſtatute has allowed the judge of aſſize to have a clerk, they ſhall not be obliged to return the *poſtea*'s themſelves, but the clerk of aſſize ſhall attend at *Weſtminſter* to return them.

Clerk of aſſize may lay his action in Middleſex, and the venue ſhall not be changed. 1 Lev. 207. 1 Mod. 37, 64. 1 Saund. 247. 6 Mod. 82. 1 Sid. 326. 5 Mod. 223. S. C. Holt 712.

Practice of changing the viſne in tranſitory actions began in K. James the Firſt's time.

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Clerks of aſſize are by ſtat. Weſtm.

(*a*) *R. ac. Bur.* 2027. *Bl.* 1065. *Vide* 1 *Wilſ.* 159. *Str.* 822.

Univerſities and Schools, &c.

Vide ante 450. S. C. Caſes B.R. 165. Skin. 665.

1. Hinton *verſus* Hern.

[Mich. 8 Will. 3. B. R.]

Vice-Chancellor's Court cannot hold plea for a penalty of a ſtatute. Gilb. C. B. 195. 14 H. 4. 20.

HINTON was libelled againſt in the Univerſity-court of *Oxford*, reciting the ſtatute of *E.* 6. and *Car.* 2. And the cuſtom of the univerſity to have but four taverns, and that he ſold wine without their licence, in contempt of the laws of the univerſity and the ſaid ſtatutes; and becauſe a penalty is inflicted by the ſaid ſtatutes, and they cannot hold plea for ſuch penalty, a prohibition was granted.

[672] S. C. ante 412.

2. Matthews *verſus* Burdett.

[Hill. 1 Ann. B. R.]

Argued whether a prohibition lay to the Eccleſiaſtical Court in a ſuit for teaching ſchool without licence from the ordinary before the act for preventing the growth of ſchiſm. Quære. S. C. Salk. 318.

IN a *prohibition* the plaintiff declared, that whereas by the common law it was lawful to teach others, and inſtruct them in any honeſt art or ſcience, and that teaching *eſt res mere laica, &c.*; yet that he was ſued in the Spiritual Court for teaching children in the elements of grammar, without licence from the ordinary. On demurrer it was inſiſted for the plaintiff,

1ſt, That the law favours means of livelihood; that grammar was equally uſeful to all literate profeſſions, and that a lawyer or phyſician could be no more without it than a divine. That all the colleges in the univerſity were lay corporations; that though the members of the college might be all of them *ſpiritual perſons*, yet the corporation was lay and temporal; becauſe the inſtitution and end was temporal, *viz.* to advance learning, which ſhews that a ſchoolmaſter is a lay employment, and was formerly under the care of the civil magiſtrate. *Stillingfleet's Orig. Brit.* 210, 212, 213. That the common law takes no notice of it but as temporal. *Vide* 11 *H.* 4. 47. *Poph.* 170. *Reg.* 35. And that the only mention of it before the Reformation, is *anno Domini* 1408. *Per Lyndewode* 282. That ſchoolmaſters permit not their ſcholars to diſpute of religion, under penalty of being cenſured for hereſy, to which every body was liable; which proviſion was to prevent the ſpreading of *Wickliffe's* doctrine. That no law or canon required a licence till the Council

Ld. Raym. 5. 1 Bl. Com. 471. 1 P. Wms. 29. Str. 1056. Rep. B.R. Temp. Hard. 326. 4 Vin. Abr. 320.

Council of *Lateran, anno Domini* 1215. *Decret.* 6. *Tit.* 5. *cap.* 1, 2, 3. and that is, that there ſhall be a ſchoolmaſter in every cathedral, and that he ſhall be licenſed by the biſhop. That the ſeveral acts of parliament which require the ſchoolmaſter's taking a licence from the biſhop, ſhew it was not neceſſary before, nor was there any ſuch uſage or practice that can be made appear. *Vide ſtat.* 23 *Eliz. c.* 2. 1 *Jac.* 1. *c.* 4. 14 *Car.* 2. *c.* 4.

2dly, That if this was a calling which a layman might follow by the common law, a canon cannot reſtrain him of the liberty the law gave him; the common law and cuſtom of the realm cannot be altered or abrogated, but by act of parliament, and therefore a canon cannot do it, though ordained by the king's royal licence, or afterwards confirmed by his royal authority. *Vide* 12 *Co.* 72. 2 *Inſt.* 97. 647, 653, 657. 2 *Ro. Ab.* 454. *Mo.* 782. *Ratio eſt*, becauſe being a layman, he is not repreſented, and therefore his conſent is not given, and a man cannot be under the obligation of a canon without his conſent expreſs or implied. In the primitive church the laity were preſent at all ſynods. When the empire became chriſtian, no canon was ever attempted without the conſent of the emperor; and his concurrence included the aſſent of the whole body of the people; becauſe he had the ſole legiſlative power in him: But this is not the caſe of our king; for he has not the whole legiſlative power in him; *ergo*, his conſent to a canon *in re eccleſiaſtica*, makes it a law to bind the clergy, but not to bind the laity. *Vide* 20 *H.* 6. 13. *Br. Ordinary* 1. 2 *Ro. Ab.* 226. 2 *Cro.* 670. 2 *Brownl.* 38. *Cro. Car.* 589. *Palm.* 379. [673]

3dly, Where the common law or a ſtatute gives a remedy *in foro ſeculari*, whether the matter be temporal or ſpiritual, the conuſance of that matter belongs to the king's temporal courts only, unleſs the juriſdiction of the Spiritual Court be ſaved by that ſtatute which gives the penalty; for otherwiſe one might be twice puniſhed for the ſame thing (*a*). *Vide Lit. ſect.* 136, 137. *Cro. Car.* 229. 1 *Mod.* 21, 22. 1 *Jon.* 320. Where a crime which was puniſhable in the Eccleſiaſtical Court, is made felony, their juriſdiction is gone. For *nota*; The nature of the crime is altered. So 2 *Leon.* 53. 4 *Leon.* 92. That in this caſe the act of parliament which gives a temporal penalty, does not ſave the juriſdiction of the Spiritual Court; which was urged as an argument that the parliament did not look upon it as an eccleſiaſtical matter; for in all caſes where acts of parliament have impoſed far- 3 Salk. 318. Hob. 121.

(*a*) It is not in *Littleton*, but in Sir *Ed. Coke's Commentary*, 96, *b.*, that this doctrine is laid down, which is ſupported, *Forteſc.* 345. 2 *Wilſ.* 79.

ther penalties in eccleſiaſtical offences, there is a ſaving added for the juriſdiction of the Eccleſiaſtical Court; ſo is 13 *Eliz. cap.* 5. of uſury; 31 *Eliz. c.* 6. of ſimony; 4 *Jac.* 1. of drunkenneſs; 3 *Car.* 1. *c.* 1. of the obſervation of the Sabbath; 3 *J.* 1. *c.* 4. of recuſancy. And they urged alſo that theſe parliaments had not added theſe ſavings, if they had been uſeleſs; but it was their opinion, that impoſing a penalty made it a temporal offence, and that their juriſdiction would have been loſt without ſuch a ſaving. And laſtly, this difference was taken, that where an act of parliament gives a remedy for a ſpiritual matter in the temporal courts, the ſpiritual juriſdiction is gone; but where an act gives a remedy in a temporal matter to be proſecuted in the Spiritual Court, yet the remedy at common law remains, as *pro violenta injectione manuum in clericum. Note;* In the ſtatute *de circumſpecte agatis*, the words are, *commiſſum fuit alias;* which muſt be underſtood of a juriſdiction before granted to them.

On the other ſide it was ſaid, that the canon of *Lateran*, before mentioned, was received in *England* as well as the other canon of the ſame council for parochial tithes, and that it appears by cuſtom, that the biſhop is to ſuperintend the education of youth. *Vide Lindw. l.* 5. tit. *De Magiſtris*, and the ſeveral ſtatutes, requiring that he ſhall have a licence from the ordinary: And it was ſaid, that the toleration act did not influence this caſe, for that did not exempt men in places of truſt from qualifying themſelves according to the rites of the church of *England*.

Vide 12 Ann. Seſſ. 2. c. 7. ſ. 5.

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Vide 1 Cro. 64, 65. 5 Co. 119. 2 Lev. 183, 243.

Void and Voidable.

1. Hall *verſus* Biggs.

[Trin. 2 W. & M. B. R.]

Where an order of juſtices is not void but voidable.

IN *debt on a bond*, with condition to ſtand to and perform the order of the juſtices, the defendant pleaded they made no order; the plaintiff replied and ſet forth the order. The defendant demurred; pretending it was a void order, and that he was not bound to perform it, comparing it to the caſe of an award; but the Court did not

not think them alike; for the order being a judicial act is not absolutely void, but voidable, and continues an order till avoided (*a*).

(*a*) *Vide Rex* v. *Inhabitants of Stotfold*, 4 *T. R.* 596.

2. Prigg *verſus* Adams & al.

[Mich. 4 W. & M. B. R.]

Judgment of a ſuperior Court is only voidable. Vide 2 Lev. 184 & 243. 3 Lev. 23. S. C. Carth. 274. Skin. 350, 366, 407. Holt 182.

IN *treſpaſs and falſe impriſonment*, the defendant juſtified as an officer under a *ca. ſa.* on a judgment in the Court of Common Pleas upon a verdict for 5*s.* for a cauſe of action ariſing in *Briſtol*. The plaintiff replied, and ſet forth the private act of parliament for erecting the Court of Conſcience in *Briſtol*, wherein was a clauſe, that if any perſon bring ſuch action in any of the Courts at *Weſtminſter*, and it appeared upon trial to be under 40*s.* that no judgment ſhall be entered for the plaintiff; and if it be entered, that it ſhall be void. Upon demurrer the queſtion was, Whether the judgment was ſo far void, that the party ſhould take advantage of it in this collateral action? And the Court held that it was not; but that it was only voidable by plea or error; as where one is taken on outlawry and hath no addition; (*vide* 7 *H.* 5. *c.* 5. 8 *H.* 6. *c.* 10. *Bend.* 14, 88, 122, 132. 1 *Inſt.* 259. *Dy.* 214. 5 *Co.* 119.) and ſaid it was not like the caſe of a judgment vacated. 2 *Sid.* 225.

2 Sid. 125. Raym. 71. 2 Inſt. 184.

3. Thompſon *verſus* Leach.

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S. C. ante 427, 576.

[Hill. 9 Will. 3. B. R.]

Bond of an infant, or non compos, is void. Vide Samuel v. Evans. 2 T. Rep. 575.

BOND of an infant (*b*) or *non compos* is void, becauſe the law has appointed no act to be done to avoid them; and the only reaſon why the party cannot plead *non eſt factum*, is, becauſe the cauſe of nullity is extrinſic, and does not appear on the face of the deed (*c*).

(*b*) The deed of an infant, which takes effect by delivery, is not void, but that of a feme covert is: The compariſon between an infant and a *non compos* is not juſt. See this ſubject very fully diſcuſſed in *Zouch ex dem. Abbott* v. *Parſons*, 3 *Bur.* 1794.; but an infant's warrant of attorney is void, *id. Saunderſon* v. *Marr*, *H. Bl.* 75.

(*c*) It may be given in evidence on *non eſt factum*, *Str.* 1104.

Vide ante 590. Lutw. 874. Vaugh 50.

Uſes and Truſts.

S. C. 4 Mod. 253. 5 Mod. 143. Judgment affi med. Show. Par. Ca. 104.

1. Davies *verſus* Speed.

[Hill. 3 W. & M. B. R. Rot. 261.]

Huſband and wife covenant to levy a fine of the wife's land to the uſe of the heirs of the body of the huſband on the wife begotten, the limitation is void. Q. 5 Mod. 153. S. C. Carth. 262, 354. 3 Cro. 334. 1 And. 328. 4 Leon. 295. 1 Vent. 372. 4 Mod. 380. 1 Vent. 272. 2 Lev. 75. Holt 730. Skin. 351. Caſes B. R. 38. 1 Mod 98, 121, 150, 237. Vide Butl. Co. Lit. 216. n. 2.

HUSBAND ſeiſed in right of his wife: Huſband and wife covenant to levy a fine to the uſe of the heirs of the body of the huſband on the wife begotten, remainder to the right heirs of the huſband. They have iſſue, the wife dies, the iſſue dies, and the huſband dies; and now the queſtion in ejectment was, Whether the heir of the huſband, or the heir of the wife, ſhould have the lands? *Et per Cur.*

1ſt, Here can be no eſtate for life to the huſband by implication; becauſe the eſtate was the wife's, to which he is a ſtranger.

2dly, This limitation to the heirs of the body of the huſband, *&c.* was merely void; for taking it as a remainder, there is no precedent eſtate of freehold to ſupport it; and taking it as a ſpringing uſe, then it is a ſpringing executory uſe, to ariſe after a dying without iſſue, which the law will not expect; ſo that it is either way void, and yet muſt be one of them (*a*): But in this caſe the Chief Juſtice held, that a feoffment to the uſe of *A.* and his heirs, to commence four years from thence, was good as a ſpringing uſe, and that the whole eſtate remained to the feoffor in the mean time; ſo it is if it were to commence after the death of *A.* without iſſue, if he die without iſſue within twenty years.

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(*a*) Suppoſing an eſtate for life in the wife by implication or reſulting uſe, capable of ſupporting the uſe to the heirs of the body of the huſband on the wife, yet as ſhe, as well as their iſſue, died in the huſband's life-time, before the limitation to *his right* heirs could veſt, *that* muſt have failed as a contingent remainder, for want of a ſubſiſting freehold eſtate at his death to ſupport it. *Fearne* 409. (210.) With reſpect to the point, that the eſtate could not reſult to the huſband, *vide ac.* Sir *T. Tipping*'s caſe, cited 1 *P. Wms.* 359. *Jenk. Cent.* 248. *c.* 18. *Fearne* 68. *Saunders on Uſes*, 178. From the nature as well as the context of this caſe, and the report in *Shower*, it evidently appears that the queſtion did not relate to the limitation to the heirs of the body, *&c.* but on the ſubſequent limitation, which (*vide Sho. & Fearne*) was not to the huſband in fee, but to the right heirs of the huſband. The limitation to the heirs of the body was not after a dying without iſſue.

2. Ld. Angleſey *verſus* Ld. Altham.

[Paſch. 8 Will. 3. B. R. Gilb. Rep. 16. S. C.]

Fine levied and common recovery ſuffered, wherein conuſee was tenant, and no uſes of the fine declared. Intended to be to the uſe of the conuſee, in order to make a tenant of the freehold. Vide infra, & prox. pag. Lutw. 273. 2 Vent. 361. S. C. Rep. Eq. 16. Rep. A. Q. 210. 1 Vern. 367. Holt 733, 736. Pigott 52. 2 Cruiſe 28. Doug. 24.

UPON the trial of this cauſe at *niſi prius* in *Middleſex*, before *Holt*, C. J. a caſe was made for the opinion of the Court, *viz.* *H.* levied a fine, and afterwards ſuffered a common recovery, wherein the conuſee was tenant, and there being no deed in the caſe, it was objected, that the uſe of the fine reſulted to the conuſor; and though the intent of the fine might be to make a tenant to the *præcipe*, yet no uſe or truſt can be averred ſince 29 *Car.* 2. *c.* 3. *Sed non allocatur;* for at common law the uſe was always intended to be to the feoffee or conuſee, and in pleading never was averred. *Co. Ent.* 114, 273. *Plowd.* 477. But if it be to the uſe of the feoffor or conuſor, then it muſt be averred (*a*).

2dly, The Court held the party was in by the fine immediately, and ſo there was a good tenant to the *præcipe* (*b*).

3dly, The ſtatute extends not to uſes by operation of law, but to ſuch uſes as are to a third perſon, and that neither the conuſor nor the conuſee could aver the fine to the uſe of a third perſon ſince the ſtatute.

(*a*) *Per* Ld. *Mansfield*, *Roe* v. *Popham*, *Doug.* 24.: The preſumption is, that the fine is levied to the uſe of the conuſor, which is liable, like all other preſumptions, to be encountered by contrary evidence. *Vide Saunders on Uſes*, 137.

(*b*) *R. acc.* 1 *Str.* 17.

3. Tregame *verſus* Fletcher.

[Hill. 8 Will. 3. B. R. 1 Ld. Raym. 154. S. C.]

Where the uſes of a recovery are declared by a deed ſubſequent, the pleading ſhould be general, that the recovery was to ſuch uſes. Vide prox. pag. Where uſes may be averred by parol, and where not. Vide 1 Salk. 75. 2 Co. 77. Lutw. 273. 1 Sid. 160. 6 Mod. 82. 1 Lev. 123.

ERROR of a judgment in the grand ſeſſions of *Wales*, in replevin, where the defendant made conuſance, that *A.* was ſeiſed in fee-tail, and ſuffered a common recovery; and that by deed made at a time ſubſequent, it was agreed the recovery ſhould be to the uſe of *B.* for the ſecurity of a rent-charge, and that rent was arrear, for which he diſtrained. Judgment was for the avowant. *Holt*, C. J. held, 1ſt, That it was not well to plead the uſes were declared by a ſubſequent deed; but he ſhould plead, *quod recuperatio habita fuit, &c. quæ quidem recuperatio in forma prædict. habita fuit* to ſuch and ſuch uſes.

2dly, He held, that where the uſes of a recovery are declared by deed precedent, no new or other uſe can be averred by parol, unleſs there was ſome variance between

2 Vent. 242. S. C. 3 Salk. 302. Comb. 40 9 Co. 10. Quere, If the conuzor or heir at law can aver it to other uſes? Caſes in Parl. 165, 145. Comb. 430.

the deed and the recovery; and that in caſe of a deed precedent, if the party ſet up other uſes, he muſt confeſs and avoid: But where they are by deed ſubſequent, new or other uſes may be averred without ſhewing the deed, though there be no variance, *&c.*, becauſe there was an intermediate time when there might be ſuch agreement made, and the uſes ariſe by the recovery according to that agreement; and if a deed ſubſequent be ſet up, the other may traverſe thoſe uſes. *Adjournatur.*

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4. Jones *verſus* Morley.

[Hill. 9 Will. 3. B. R. 1 Ld. Raym. 287. S. C. Comyns 29. S. C.]

Where a conveyance to uſes enures by way of transmutation of poſſeſſion, the uſes may be declared or revoked without deed. Vide 2 Lev. 77. 1 Co. Rector of Chedington. S. C. Carth. 410. 4 Mod. 261. 2 Lev 149. 2 Keb 365. Raym. 239. 1 Vent. 278, 368. 2 Rol. Abr. 749. 2 Rep. 71. b. 1 And. 126. Dyer 309. 1 And 240. Moor 789. 2 Rol. Abr. 221. Bridg. 112. S. C. Comb. 429. Cro. B. R. 159. Rol. 321. 5 Co. 25. 1 Atk. 2. Saunderſon Uſes 213.

UPON a ſpecial verdict in ejectment it was found, that *Bowyer* being ſeiſed in fee, in conſideration of marriage, by indenture of leaſe and releaſe conveyed to *A.* and *B.* to the uſe of herſelf in fee, till the intended marriage with *Edward Morley* ſhould take effect, and until the ſaid *Morley* ſhould ſettle upon her a jointure of 300 *l.* *per annum*, and then to the ſaid *Morley* and his heirs: The marriage took effect, and on the 29th day of *January* 1665, they covenanted and agreed to levy a fine next *Hilary term*; and the uſe thereof was declared by the ſame deed to be to *E. Morley* and his heirs. Afterwards, *viz.* the 31ſt day of the ſame month, by indenture between the huſband and wife, it was agreed and declared, that the uſes of the deed of the 29th ſhould be revoked After this, the ſame *Hilary term*, a fine was levied; and this writing of the 31ſt being no deed, it was reſolved,

1ſt, That by the agreement of the 29th, the parties meant a fine to be levied *Hilary term* come twelve months, and not the *Hilary term* then current, and therefore this fine was not purſuant to that covenant.

2dly, That if the fine had been levied purſuant to that covenant, no parol averment could have been allowed to declare other uſes, or that the fine was not to the uſes of that deed, and all parties had been ſtopped to aver the contrary by parol; but by deed ſubſequent, and before the fine, other uſes may be averred.

Carth 412. Comb. 430.

3dly, That ſince the fine is not according to the deed, other uſes may be averred, though they were declared by writing, and not by deed; for by the variance there is room and occaſion given to inquire and receive information, that the old agreement was relinquiſhed; and by the ſame reaſon the uſe of a fine may be declared by parol upon an original agreement, it may now, as in this caſe, where the original agreement was relinquiſhed: Yet without

out ſuch averment the fine ſhall be intended to the uſe of the firſt agreement, notwithſtanding the variance.

4thly, That this is a good revocation of the uſes of the firſt deed, though it be but a writing; for where the conveyance enures by way of tranſmutation, the uſe is according to the intent of the party, and it is no matter how that intent is manifeſted, ſo as it may be known; but where the conveyance is by way of covenant to ſtand ſeiſed, there muſt be a valuable conſideration, or a binding agreement by deed (*a*).

Plowd. 301. Gilb. on Uſes 45. Carth. 412. Lutw. 1248. 1 Sid. 26, 82. A uſe ſhall not be raiſed for natural affection without deed. Mo. 688.

(*a*) The judgment in this caſe was affirmed in the Houſe of Lords, *Show. Par. Ca.* 140.

5. Shortridge *verſus* Lamplugh.

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S. C. Fareſt. 71. 3 Salk. 386. Holt 621. Vide poſt. pl. 7.

[Mich. 1 Ann. B. R. 2 Ld. Raym. 798. S. C.]

H. Brought covenant as aſſignee of a reverſion, and ſhewed, that the leſſor, in conſideration of 5 *l.* bargained and ſold to him for a year, and afterwards releaſed to him and his heirs, *virtute quarundam indentur. bargainæ venditionis & relaxationis necnon vigore ſtatuti de uſibus, &c.* he was ſeiſed in fee. And it was objected, that the uſe muſt be intended to be to the releſſor and his heirs, becauſe no conſideration of the releaſe nor expreſs uſe appeared by the pleading; ſo that without conſidering the operation of the conveyance, the queſtion was upon the pleading, Whether the uſe ſhall be intended to the releſſor, unleſs it be averred to be to the releſſee? *Et per Holt*, C. J. to which the reſt agreed.

If a leaſe and releaſe be pleaded to A. and his heirs, and no conſideration appears, nor ſaid to whoſe uſe it was, it ſhall be intended to be to the uſe of the releaſee and his heirs. Dyer 146.

This way of pleading was certainly good before the ſtatute 27 *H.* 8. ſo is *Plowd.* 478. and many precedents in *Co. Ent.* of feoffments averred in the ſame manner; for the uſe was a matter that was extrinſical to the deed, and depended upon collateral agreements at *common law*, and then the uſe might, *as ſince the ſtatute of frauds by writing*, be averred by parol, and therefore in pleading the conveyance was taken to the uſe of him to whom the conveyance was made, till the contrary appeared; if it were otherwiſe, it ought to come on the other ſide; and 27 *H.* 7 has not altered the courſe of pleading, which is rather confirmed by the ſtatute; becauſe, if now the uſe be conſtrued to be to the releſſor or feoffor, the conveyance will be to no manner of purpoſe, it being ſtill the old eſtate to which the old warranty and other qualities remain annexed; whereas before the ſtatute there might be ſome end in making the feoffment, *viz.* to put the freehold out of him and prevent wardſhip; and *Co. Lit.*

Vide Hob. 20. 2 Wilſ. 19. Saunderſon Uſes 128—138. 2 Atk. 148. Co. Lit. 271.

goes

goes no farther, than where is a feoffment to particular uſes and eſtates, the reſidue of the uſe ſhall be to the feoffor, which is reaſonable; for the raiſing thoſe particular eſtates appears a ſufficient reaſon for the conveyance. And *Powel*, J. doubted, whether there could be a reſulting uſe on a leaſe and releaſe, unleſs where particular uſes are limited; for this way of conveyance is grounded on the ancient way of releaſing at common law, wherein there was a merger of eſtate, which is a good conſideration, as where the leſſor confirms to the leſſee and his heirs. In error of a judgment of *C. B.* which was affirmed.

Q. Whether there can be a reſulting uſe upon a conveyance by leaſe and releaſe? Vide 1 Lev. 30. 2 Lev. 77.

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6. Broughton *verſus* Langley.

[Hill. 1 Ann. B. R. 2 Ld. Raym. 873. S. C.]

Vide 1 Chan. R. 176. Lutw. 823.

Deviſe to truſtees and their heirs, on truſt to permit A. to take the profits for his life, and afterwards to ſtand ſeiſed to the uſe of the heirs of A.'s body, is a uſe in A. and he has a tail. S. C. Eq. Ab. 383. p. 3. 1 Lutw. 814. Holt 708. 2 Vent. 311, 312. Whatever was or would have been a truſt at common law, is ſince the ſtatute of uſes executed. 1 Vent. 232.

ONE ſeiſed of lands in fee, deviſed them to truſtees and their heirs, to the uſes, intents, and purpoſes herein-after mentioned, *viz.* to the intent and purpoſe to permit *A.* to receive the rents and profits for his life, and after that the truſtees ſhould ſtand ſeiſed of the premiſes to the uſe of the heirs of the body of *A.* with a proviſo, that *A.* with the conſent of his truſtees, might make a jointure for his wife; and the queſtion was, Whether *A.* had an eſtate-tail executed, or not? And it was adjudged he had (*a*). *Holt*, C. J. pronounced the judgment of the Court, and gave theſe reaſons: 1ſt, That this would have been a plain truſt at common law, and what at common law was a truſt of a freehold or inheritance is executed by the ſtatute, which mentions the word *truſt* as well as *uſe*; and the caſe in 2 *Vent.* 312. *Burchet* and *Durdant*, is not law; and that the change of expreſſion in the principal caſe by uſing the word *permit* in the firſt clauſe, which are words of truſt, and afterwards making mention of a uſe, is immaterial, in regard truſts at common law and uſes are equally executed by the ſtatute.

2dly, It was held, That a power to make a jointure, does not neceſſarily exclude an eſtate in tail, or an intent to give it; becauſe tenant in tail, without diſcontinuing or barring the tail, cannot make a jointure; and ſo this power has its uſe.

(*a*) Where an eſtate is deviſed to one for the benefit of another, the Courts execute the uſe in the firſt or ſecond deviſee, as appears beſt to ſuit with the intention of the teſtator, *Butl. n. Co. Lit.* 271. *b.* under 278. *a.* The uſe veſts in the truſtees on a limitation to pay over the rents and profits, *Symon* v. *Turner*, *Eq. Ab.* 382.; *Buſh* v. *Allen*, 5 *Mod.* 63.; *Nevil* v. *Saunders*, *id.*, and 1 *Vern.* 415.; *Jones* v. *Lord Say and Seal*, *Eq. Ab.* 382. 8 *Vin.* 262. 3 *Bro. P. C.* 458.; *Shapland* v. *Smith*, 1 *Bro. Ch.* 75. *Silveſter ex dem. Lane* v. *Wilſon*, 2 *T. R.* 44. 2 *Bl. Com.* 336.; *Saunders on Uſes*, 231.; *Vide Bagſhaw* v. *Spencer*, 1 *Vez.* 142.

7. Adams *verſus* Tertenants of Savage.

[Hill. 1 Ann. B. R.]

S. C. 1 Salk. 40. & ante 601. 2 Ld. Raym. 854.

Leaſe and releaſe by A. to truſtees and their heirs to the uſe of A. for 99 years, remainder to the uſe of the truſtees for 25 years, remainder to the heirs male of A.'s body: remainder to his right heirs, is void, for want of a freehold. 1 Chan. Rep. 239. 6 Mod. 134, 199, 226. 3 Salk. 321. Holt 179. Lill. Ent. 398. Mod. Caſ. 134, 199, 226. Fareſt. 15.

IN a *ſcire facias* on a judgment againſt tertenants, it was found by ſpecial verdict, that one *Savage* being ſeiſed in fee, conveyed by leaſe and releaſe to truſtees and their heirs, to the uſe of himſelf for 99 years, remainder to the uſe of the truſtees for twenty-five years, remainder to the heirs male of his own body, remainder to his own right heirs; the queſtion was, Whether *Savage* was tenant in tail, or only tenant for years? And the Court held the limitation to the heirs male of the body to be void, becauſe there was no preceding eſtate of freehold limited to ſupport it; and it ſhall not be implied contrary to the intent of the conveyance; and if it could be implied, it muſt be out of the eſtate given to the heirs of the body, which cannot be, becauſe this is a new uſe; whereas a reſulting uſe is always from the old eſtate, and parcel of the old uſe; and here the eſtate takes effect by tranſmutation of poſſeſſion out of the ſeiſin of the truſtees; and not like *Fenwick* and *Milford*'s caſe (*a*), where the owner covenanted to ſtand ſeiſed to the heirs of his body. And yet *per Powel*, J. Even in that caſe, if there had been an expreſs eſtate limited to the covenantor, it had been otherwiſe (*b*).

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(*a*) The caſe alluded to is *Pibus* v. *Mitford*, 1 *Vent.* 372.

(*b*) *Vide Pibus* v. *Mitford*, 1 *Vent.* 372.; *Penhay* v. *Harrell*, 2 *Vern.* 370.; *Rawley* v. *Holland*, 5 *Vin.* 189. 2 *Eq. Ab.* 753.; *Tippin* v. *Coſin*, *Carth.* 272. 4 *Mod.* 380.; *Fenwick* v. *Mitford*, *Moor* 284.; *Elſe* v. *Oſborne*, 1 *P. W.* 387.; *Southcott* v. *Stowell*, 1 *Mod.* 226. 2 *Mod.* 207.; *Wills* v. *Palmer*, 5 *Bur.* 2615. 2 *Bl.* 687.: The general concluſion from which, is thus ſtated by Mr. *Fearne*: "The inference afforded by the ſeveral caſes ſeems to be, that when the uſe is not limited away *during the whole* life of the grantor, and there is an uſe limited which cannot commence till after his deceaſe, (as is the caſe of a limitation to the heirs of his body taken by itſelf,) whether that uſe be limited in the firſt inſtance, (as in *Pibus* v. *Mitford*,) or be preceded by limitations for terms of years, (as in *Penhay* v. *Harrell*,) or by uſes of the freehold or inheritance that may determine in the grantor's life, (as in *Wills* v. *Palmer*,) the uſe reſults to the grantor for life, immediately in the firſt caſe, and in remainder expectant on the preceding uſes in the other, where there is no expreſs uſe limited to the grantor himſelf, inconſiſtent with ſuch an implication. *Vide Butl.* 2 *Co. Lit.* 216. *a.*

8. Pye *verſus* George.

[Mich, 9 Ann. In Canc. S. C. 1 Wms. 128. Prec. in Ch. 308. 1 Eq. Ca. Ab. 384.]

Truſtees join to bar a contingent remainder, it is a breach of truſt. Cro. Car. 312. 1 Chan. Rep. 28, 296.

TRUSTEES appointed to preſerve contingent remainders did join in a conveyance to deſtroy the remainder before a ſon was born; and this was decreed a plain breach of truſt; and that whoever claimed under this conveyance, having notice of the truſt, or by a voluntary ſettlement, ſhould be liable to make good the eſtates. *Per Harcourt*, Lord Keeper (*a*).

(*a*) *Vide* the ſtatement of this caſe, 1 *Bro. P. C.* 366. the decree was affirmed in the Houſe of Lords.

It was ruled in *Manſell* v. *Manſell*, 2 *P. Wms.* 678. *Temp. Talb.* 252., that the deviſee of tenant for life, to whom the truſtees for ſupporting contingent remainders had conveyed the eſtate, ſhould reconvey to the uſes of the ſettlement.

In the caſe of *Platt* v. *Sprigg*, 2 *Vern.* 303., the truſtees were directed to join in a ſale to pay off a mortgage prior to the ſettlement: So in *Baſſet* v. *Chapman*, 1 *P. W.* 358., in a conveyance for the benefit of the creditors of a perſon who had made a voluntary ſettlement: So where lands have been limited to the father for 99 years, *&c.*, remainder to truſtees, *&c.*, remainder to the firſt and other ſons in tail, remainders over, the Courts of Equity will direct the truſtees to join in a ſettlement on the marriage of the eldeſt ſon, to preſerve the eſtate in the family, and anſwer the uſes originally intended, *Frewin* v. *Charleton*, 1 *Eq. Ab.* 386.; *Winnington* v. *Foley*, 1 *P. Wms.* 536.; but will never interpoſe for the purpoſe of enabling any of the parties to ſell the eſtate, and diſturb the original intention of the ſettler or deviſor, *Davies* v. *Weld*, 1 *Vern.* 181. 1 *Eq. Ab.* 386.; *Townſend* v. *Lawton*, 2 *P. Wms.* 379.; *Symance* v. *Tattam*, 1 *Atk.* 613.; *Woodhouſe* v. *Hoſkins*, 3 *Atk.* 22.; *Barnard* v. *Lenge*, *Cox's* note 2 *P. Wms.* 684. 1 *Bro. Ch.* 534. *Ambler* 774. *Vide* Sir *Tho. Tippen's* caſe, cited 1 *P. Wms.* 359.; *Tipping* v. *Pigott*, 1 *Eq. Ab.* 365. *S. C.*, in which the Court refuſed to aid the heirs of *A.* againſt a ſubſequent ſettlement made by *A.* and the truſtees, under a ſettlement in truſt for *A.* for years, remainder to preſerve, *&c.*, remainder to the firſt and other ſons, remainder to the heirs of *A.* *Vide* alſo *Elſe* v. *Oſborne*, 1 *P. Wms.* 387.

Mr. *Fearne* ſays, "It ſeems to be the ſafeſt way for truſtees not to act, except in the cleareſt caſes, without the direction of the Court. I ſhould rather recommend to their attention the words of the Lord Chancellor in *Pye* v. *George*, (cited 2 *P. Wms.* 684.) "That it would be a dangerous experiment for truſtees in any caſe to deſtroy remainders which they were appointed by the ſettlement to preſerve;" as well as the obſervation of *Reynolds*, *C. B.*, in *Manſel* v. *Manſel*, "That whatever the Court have done, or may do, under particular circumſtances, yet they will never have it left to the diſcretion of a truſtee to do it, *Temp. Talb.* 259." *F. C. R.* 493. *Vide Garth* v. *Cotton*. 1 *Vez.* 524, 546.

Uſury and Extortion.

Cro. Jac. 104, 509. Cro. Car. 283, 253. 1 Leo. 54. 1 Hawk. cap. 68 & 82.

1. Domina Regina *verſus* Smith.

[Paſch. 4 Ann. B. R. 2 Ld. Raym. 1144. S. C. 3 Ld. Raym. Entries 47.]

INDICTMENT was at the ſeſſions before the juſtices of the peace at *Hicks's Hall*, for uſury, *contra formam ſtatuti*, and judgment was againſt the defendant, upon which a writ of error was brought in *B. R.* and the judgment reverſed; for the juſtices of the peace have no juriſdiction in this caſe (*a*).

4 Mod. 51, 379. Juſtices of peace have not juriſdiction upon the ſtatute of uſury.

(*a*) But for extortion they have, 2 *Hawk.* 40. They have not for perjury or forgery at common law; but for perjury upon the ſtat. 5 *Eliz.* they have.

2. Domina Regina *verſus* Baynes.

[Paſch. 5 Ann. B. R. 2 Ld. Raym. 1199, 1265. S. C.]

UPON a *certiorari* this order was removed, Whereas by complaint in writing at this ſeſſions, exhibited to this Court againſt *R. B.* clerk of the peace, *R. B.* was charged with divers miſdemeanors in his office, *viz.* that he exacted of one *A.* the ſum of 5 *s.* for a *ſubpœna*, and did compel one *B.* to pay him 9 *s.* more than his due fee; and it doth appear upon evidence, that the ſaid *R. B.* miſdemeaned himſelf in his office by extorting of the ſaid *A.* by colour thereof 5 *s.* more than was due, and of the ſaid *B.* 9 *s.* more than was due; this Court doth diſcharge and remove him from the ſaid office of clerk of the peace.

Charge of extortion ought to be particular, and laid the defendant took it extorſive. S. C. 4 Mod. 31, 32. 6 Mod. 192. Holt 512, 514.

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Note; By 1 *W. & M. Seſſ.* 1. *cap.* 21. *ſect.* 4. If any clerk of the peace do miſdemean himſelf in his office, and thereupon a complaint and charge in writing of ſuch miſdemeanors be exhibited againſt him to the ſeſſions, the ſeſſions ſhall diſcharge him. It was agreed by all, that if here was not a charge of extortion againſt *R. B.* then he was not removed; for the juſtices have only a ſpecial authority to execute as the ſtatute appoints, and the act ſhall be conſtrued ſtrictly, becauſe it deprives the defendant of the benefit he has by *Magna Charta*, of being tried *per pares*. The juſtices of the Queen's Bench being divided, it was adjourned into the Exchequer-Chamber, where *Gould* and *Powys*, Juſtices, *Smith*, Baron, *Ward*, C. B. and *Trevor*, Ch. Juſt. of the Common Pleas, held this a good charge of

of extortion, by reaſon of the *viz.* which particularizes the general charge, and incorporates what follows after it with what went before it. Cited 2 *Brownl.* 151. 1 *Vent.* 37. *Weſt's Preced.* 97, 130. 1 *Sid.* 91. 1 *Keb.* 357. *Holt*, C. J. *Powell*, and five more juſtices, *contra.* Before the *viz.* all was mere recital and alſo general, and no general charge is by law allowable in any caſe but barretry, which in its nature muſt conſiſt of a heap and multitude of particulars; but that in this caſe it ought to be certain and poſitive; becauſe he is charged with a miſdemeanor, and ought to know what he is to anſwer to; he is not only to be fined, but to loſe his freehold; and where a man is to loſe any part of his property, he muſt have a certain charge againſt him; the act requires the cauſe of removal ſhould be in writing, that the cauſe may appear, and that he may have the benefit of appeal; and theſe articles are in the nature of informations; that what went before the *videlicet* being only matter of recital, and a kind of title to the articles, the charge begins at the *videlicet*, and then it does not appear that theſe miſdemeanors relate to his office. It is not ſaid that he took thoſe ſums *extorſive & colore officii*, and a man cannot be charged for extortion without charging him with acting *extorſive*, which are words as neceſſary as *proditorie & felonice.* In this caſe *non conſtat* but 8 *s.* was his fee. The charge ſhould have been, either that 2 *s.* was his fee; and that he *colore officii ſui extorſive* took 8 *s.*, or generally, that he *colore officii ſui injurioſe & extorſive* took 8 *s. pro feodo*, &c.

In convictions what appears upon evidence will not ſupply the defects of the charge.

Laſtly, They held, that what followed upon evidence before the juſtices, does not help, becauſe it is no part of the charge: And the order quaſhed. *Note;* This report is only of the effect of what was ſaid in *B. R.*

Note; The ſtat. of uſury is not pleadable to a bottomry-bill or bond, &c. 1 *Lev.* 54. 2 *Lev.* 7. 1 *Show.* 8.

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1 Leon. Caſ. 340. 2 Leon. Caſ. 143. Cro. El. 790. 3 Leon. Caſ. 55. 2 Inſt. 45.

Wager of Law.

1. Anonymous.

[Trin. 11 Will. 3. B. R.]

Method of performing wager of law. 2 Vent. 171.

ACTION *of debt* was brought on a by-law; the defendant waged his law, and a day was given upon the roll for him to come and make his law; and now upon

the laſt day of the term he came: And *Northey* for the plaintiff inſiſted, that if he ſwear falſely or raſhly, and without reaſon, the Court is not bound to receive him to it, and prayed a day to ſpeak to that point. *Sed per Holt*, C. J. We can admoniſh him; but if he will ſtand by his law, we cannot hinder it, ſeeing it is a method the law allows; and the defendant was ſet at the right corner of the bar, without the bar, and the ſecondary aſked him, If he was ready to wage his law? He anſwered, Yes; then he laid his hand upon the book, and then the plaintiff was called; and a queſtion thereupon aroſe, Whether the plaintiff was demandable? and a diverſity taken where he perfects his law *inſtanter*, and where a day is given in the ſame term, and when in another term. As to the laſt, they held he was demandable, whether the day given was in the ſame term or another. Then the Court admoniſhed him and alſo his compurgators, which they regarded not ſo much as to deſiſt from it; accordingly the defendant was ſworn, that he owed not the money *modo & forma*, as the plaintiff had declared, nor any penny thereof. Then his compurgators ſtanding behind him, were called over, and each held up his right hand, and then laid their hands upon the book, and ſwore, that they believed what the defendant ſwore was true. *Per Northey*, This will be a reaſon for extending *indebitatus aſſumpſits* further than before. *Holt*, C. J. We will carry them no farther.

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Note; This ſeems to be the caſe mentioned *pl.* 2. to have happened in *B. R.* about two years before, and not to be law.

2. Mood *verſus* The Mayor of London. [683]

[2 Martii 1701. *At* Guildhall Chamber.]

S. C. 1 Salk. 397. Holt 740, 369. Vide 2 Lev. 106.

Wager of law lies not in debt on a by-law, nor any action where a wrong is ſuppoſed. 1 Show. 75. 3 Keb. 337 2 Lev. 142, 174. 9 Co. 87, 88. 1 Lev. 151. 2 Roll. Abr. 106.

IN *debt* for the penalty of a by-law the defendant waged his law, and it was over-ruled in the court of the Lord Mayor, and a commiſſion of error ſued out before *Holt*, C. J., *Ward*, Chief Baron, and other commiſſioners. *Et per Holt*, C. J. Debt on a by-law made by a corporation, is founded on the wrong of the party in not ſubmitting to the order of the government of the corporation, and it ariſes from his contempt and diſobedience, and in ſuch caſes no wager ought to be allowed: So it is in debt for an eſcape, for it ſuppoſes a wrong, and the action lies not againſt the executors: So it is in debt for ſubſtraction of tithes: So it is in debt againſt an executor on a *devaſtavit*, becauſe it ſuppoſes a wrong, and therefore the ſame action lies not againſt the executor of the executor.

By

By common law, if a contract was ſecret and wanted witneſſes, it was a privilege on the plaintiff's ſide as well as the defendant's; for if the contract was ſecret, the plaintiff had the privilege of putting the defendant to his oath. This appears from *Magna Charta*. *Nullus ballivus ponet aliquem ad legem manifeſtam, nec ad ſacramentum ſimplici loquela ſua ſine teſtibus fidelibus*. Before this, the plaintiff, on his declaration upon bare affirmance, might make the defendant ſwear there was nothing due. At this day, if the plaintiff produce witneſſes to prove his demand, the Court may put the defendant to wage his law; and in ſuch caſe the defendant is not at liberty to croſs-examine, no more than where the plaintiff in a prohibition produces witneſſes to prove his ſuggeſtion.

Wager lies in account if he received of the plaintiff, not of a ſtranger. And in detinue, whether his receipt was of the plaintiff or a ſtranger.

No wager lies but where the debt ariſes from a ſimple contract that is ſecret, and not where the action is founded on any thing that is notorious. In account, if the receipt was by the defendant, the defendant may wage, not if by the hands of a third perſon. It is true, the law is otherwiſe in detinue on a bailment; for though the bailment was by the hands of a third perſon, the defendant may wage his law; but here the bailment is not traverſable, but the detainer, and that is the point of the action, and the redelivery might be private.

In debt ſur arbitrament.

In debt on an arbitrament, *(I intend where the ſubmiſſion is by parol,)* the defendant may wage his law; becauſe, though the arbitrators, who are ſtrangers, are concerned, yet the ſubmiſſion might be ſecret; and that is the foundation from whence the debt ariſes.

In debt for an amerciament in a court-baron. But not on a judgment in a court-baron. 2 Mod. 140. 2 Vent. 171.

In debt for an amerciament in a court-baron, the defendant may wage his law; the reaſon is, becauſe the matter is of ſmall value which concerns the lord only; tranſacted *in pais*, * which might be without his knowledge: But in debt on a judgment in a court-baron, the defendant cannot wage his law; for the judgment could not be but by confeſſion or verdict, and it was in a proper court; all which the defendant cannot by his bare oath falſify; and the authorities to the contrary are not law; and ſo it is in debt on a judgment in a court of ancient demeſne. *Br. Leygager* 11, 34.

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Lies not in debt for rent, and the reaſon.

In debt for rent on a leaſe parol, the defendant cannot wage his law; becauſe his occupation is notorious, which is a better reaſon than becauſe it favours of the realty; and ſo it is in account againſt a bailiff for the ſame reaſon, his management and tranſaction being notorious.

Not in debt by a gaoler for meat and drink.

In debt brought by a gaoler againſt his priſoner for meat and drink, the defendant cannot wage, not becauſe the gaoler is obliged to find him victuals; that is not true, as appears by *Plowd.* 68. *a.*, but becauſe the defendant is in durance,

durance, and the plaintiff cannot take ſecurity from him for repayment; for a bond will be void, ſo that he muſt be content with a promiſe: And he did not deny the caſe of 9 *Co.* 87. *b.* 88. *a.*, which was debt by a labourer; it is but juſt that the plaintiff ſhould prove he was retained, rather than that the defendant ſhould be put to wage his law.

In debt on a by-law made by a company, the defendant in a caſe cited to be in *B. R.* about two years before, waged his law; but *Holt*, C. J. ſaid, it was becauſe the counſel for the plaintiff did not challenge it; for he wondered at it then; but this is not ſo ſtrong as debt on a by-law by a corporation; for this obliges all ſtrangers without notice; but the other only their own members, till notice: And the Chief Juſtice denied the caſe in *Co. Ent.* 118., and the caſe 2 *Ro. Ab.* 106. *pl.* 9.

Note; *A bailiff may not wage his law, but a receiver may. Cro. El.* 790.

Warranty.

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Vide 2 Inſt. 276. 1 Co. 1. Cro. Car. 483. Cro. El. 72. Lutw. 853. Stat. 4 & 5 Ann. c. 16.

Smith *verſus* Tyndal.

[Paſch. 4 Ann. B. R.]

IN *ejectment*, a caſe was made for the opinion of the Court: *Maximilian Taylor* being ſeiſed in fee made his will in the year 1674, and thereby gave ſeveral perſonal legacies; and, amongſt others, four coats to four poor boys of the pariſh of *J. S.* for ever; and then he deviſed all his lands, tenements, and hereditaments whatſoever, and likewiſe all his goods, chattels, money, and perſonal eſtate, to *Margaret* his wife, and her aſſigns, and made her executrix, and left 1000 *l.* perſonal eſtate. *Margaret* married *Archibald Tyndal*, and they two by indenture covenant to levy a fine to the uſe of them two for their lives, remainder to *Archibald* and his heirs with warranty, and accordingly a fine was levied.

1ſt, The Court held this deviſe to *Margaret* was a fee, becauſe it was ſubject to a perpetual charge † (*a*).

† N. Only Powys and Gould went upon this reaſon. Holt and Powell thought that charge might be applied out of the perſonal eſtate. 2 Mod. 25.

2dly,

(*a*) *Vide* 1 *Inſt.* 9. *b.* 8 *Vin.* 222. *Lee* v. *Jones*, 2 *Sho.* 49. 2 *Jo.* 107.; *Baddeley* v. *Leppingwell*, 3 *Bur.* 1533.; *Frogmorten ex dem. Bramſtone* v. *Holyday*, *id.* 1618.; *Goodright ex dem. Fbipps* v. *Allen*, 2 *Bl.* 1041.; *Bible ex dem. Mole* v. *Thomas*, *id.* 1043.; *Doe ex dem. Palmer* v. *Richards*, 3 *T. R.* 356.;

Wood's Inſt. 228. 4 & 5 Ann. c. 16. alters this point; no collateral warranty ſhall be a bar.

2dly, That in caſe it was not, yet that the heir of *Margaret* was bound by this collateral warranty.

Ceſtuiq; uſe may take advantage of a warranty annexed to the eſtate. 3 Rep. 62. 3 Co. 58, 59, &c. 8 Co. 54. Lutw. 853. 1 Mod. 182, 923. 2 Mod. 14.

3dly, That though a *ceſtuiq; uſe* is in the *poſt*, and not in the *per*, yet he may take advantage of a warranty annexed to his eſtate, according to *Lincoln* College's caſe; *ratio eſt*, becauſe, by the ſtatute of uſes, the eſtate in law in poſſeſſion is transferred to his uſe, and he is tenant of the legal eſtate, and has all advantages that the tenant had before to defend his eſtate; therefore he may rebut, for that is to defend; but he cannot vouch, for that is to recover in value for the loſs.

Plaintiff in ejectment may make title by a collateral warranty. Vide ante, page 421.

4thly, The Court held, that the plaintiff in ejectment may make title by a collateral warranty, and give it in evidence as his title, according to 10 *Co.* 97. So if a diſſeiſor dies after five years quiet poſſeſſion, and the diſſeiſee enter, the heir may maintain an ejectment, for the right of poſſeſſion belongs to the heir, though the mere right be in the diſſeiſee: So if a man enters by wrong and diſſeiſes another, and continues twenty years in quiet poſſeſſion, yet in theſe caſes, if a writ of right were brought, and the miſe joined upon the mere right, the verdict muſt be for the plaintiff, notwithſtanding the ſtatute of limitations in the one caſe† or the collateral warranty in the other.

† Qu. Or the deſcent caſt.

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Rights of entry are bound by collateral warranty. Vide Stat. 4, 5 Ann. c. 16.

5thly, That rights of entry are bound by collateral warranty as well as rights of action.

Warranty binds, not extinguiſhes a right.

6thly, That no warranty extinguiſhes a right, but only binds or bars it as long as the warranty continues in force; for if the warranty be releaſed, the ancient right revives. *Litt.* § 708.

356.; *Goodright ex dem. Baker* v. *Southouſe*, *id.* 272.; *Denn ex dem. Moor* *Stocker*, 5 *T. R.* 13; *Andrew* v. v. *Muller*, *id* 538.

Vide Cro. El. 694. 9 Co. 28. 1 Keb. 509.

Waifs, Eſtrays[a], &c.

Henly *verſus* Walſh.

[Mich. 4 Ann. B. R.]

Owner of a ſtray may ſeiſe it, tendering ſatisfaction. S. C. 3D.

TRESPASS for his horſe: Defendant pleaded, that one *Pooly* was owner of the horſe, and that the horſe eſtrayed out of his poſſeſſion, and came to the hands of

(a) In the caſe of an eſtray, proclamation muſt be made on *two* market days at *two* of the next market towns, ſhewing the marks of the cattle; and if the owner comes not within a year and a day after, and claim the cattle, they are a forfeit to the lord of the manor, *Wood's Inſt.* 213.

the

the plaintiff, and that he by command of *Pooly* demanded the horſe within a year, &c., and tendered amends, and that the plaintiff refuſing to deliver him, he took him. To this there was a frivolous replication, and upon that a demurrer. *Et per Cur.*, 282. D. p. 2, 284. p. 2, 3. Rep. A. Q. 89. Holt 563.

1ſt, Without telling any marks, or making any proof of property (which may be done upon the trial) the owner may ſeiſe his horſe where he finds him. *Vide Co. Ent.* 40, 170. *b. Raſt.* 680. 7 *H.* 6. 2. 44 *E.* 3. 14. *Br. Eſtray* 1.

And, 2dly, Though the defendant does not plead directly that he tendered amends, but only that he demanded the horſe *proferendo ſatisfaction.*; yet the Court held this a direct affirmation, like the caſe of *warrantizando vendidet*; where the participle affirms as directly as a verb; ſo *dans plagam mortalem* is well enough. *Vide* 2 *Cro.* 630. 4 *Co.*, *Long*'s caſe.

3dly, The Court held, that though it was ſaid he tendered amends generally, and did not expreſs any certain ſum, yet that was good in this caſe; and a difference was taken between this caſe and *that of a tender of amends for a treſpaſs.* In that of a treſpaſs, if the defendant pleads a tender of amends, he muſt ſhew what he tendered; for he muſt tender a certain ſum; and the law puts this difficulty upon him, becauſe he is the wrong-doer, and the other is confeſſedly a party injured: But the owner of the ſtray is no wrong-doer, and it is impoſſible he ſhould know how long his horſe had been in the lord's cuſtody, nor how much will make a proper ſatisfaction (*a*). And in pleading it, he need not ſhew a certain ſum. Cro. El. 813. 1 Show. 161, 162. [687] 1 Ro. 877. 2 Ro. 92. Hutt. 68.

Another exception was, that the defendant does not aver the amends tendered was refuſed. *Et adjournatur. Vide Cro. El.* 888, 889. 1 *Ro. Ab.* 879. 2 *Ro.* 92. 1 *Sid.* 13. 2 Vent. 109. 1 Sid. 13. Ante 623.

(*a*) But ſufficient amends muſt be tendered, for till then the lord may lawfully detain the eſtray.

Weights and Meaſures.

Vide Stat. 8 Ann. c. 18. Lamb. 356. Dalt. 146, 155. Baker's Chron. 43.

Dominus Rex *verſus* Flint.

[Mich. 10 Will. 3. B. R. 1 Ld. Raym. 442. S. C.]

THE defendant was indicted for not making his bread of lawful weight, and demurred to the indictment; and Mr. *Buxton* took exception, that it was only *debitum* In indictment for making light bread, it is not enough to ſhew

that it had not due weight, without ſhewing what is due weight, and what is wanting. S. C. Caſes B. R. 242. Vi. 3 Bur. 1697.

pondus minime habens, not ſhewing how much *debitum pondus* was, and what was wanting; and this was agreed to be a fatal exception by *Holt*, C. J. And whereas it was ſaid the demurrer had confeſſed a deficiency, the Court held the demurrer confeſſed nothing but what was well pleaded.

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Vide ante 570. & tit. Revocation 592.

Wills and Teſtaments.

Shires *verſus* Glaſcock.

[Paſch. 3 Jac. 2. C. B.]

The atteſtation good within the ſtatute of frauds, if the teſtator might ſee the witneſſes ſign, if he pleaſed. S. C. Eq. Ab. 403. p. 8. Carth. 81.

UPON a feigned iſſue, the queſtion was, Whether the will was made according to the ſtatute of frauds? For the teſtator had deſired the witneſſes to go into another room, ſeven yards diſtant, to atteſt it, in which there was a window broken, through which the teſtator might ſee them. *Et per Cur.* The ſtatute required atteſting in his preſence, to prevent obtruding another will in place of the true one. It is enough if the teſtator might ſee, it is not neceſſary that he ſhould actually ſee them ſigning; for at that rate if a man ſhould but turn his back, or look off, it would vitiate the will. Here the ſigning was in the view of the teſtator; he might have ſeen it, and that is enough. So if the teſtator being ſick ſhould be in bed and the curtain drawn (*a*).

(*a*) The ſame point was decided in *Davy and Nicholas* v. *Smith*, 3 *Salk.* 395.; and in *Caſſon* v. *Dale*, 1 *Bro. Cb.* 99., where the teſtatrix was in a carriage when the will was atteſted in an attorney's office, through the window of which ſhe might ſee what paſſed there.

But if it appears that the teſtator could not ſee the witneſſes atteſt, the will is void, though they retire for the purpoſe at his requeſt, *Eccleſton* v. *Petty*, al. *Speke*, *Carth.* 79. *Comb.* 156. 1 *Sho.* 89. *Holt* 222.; *Broderick* v. *Broderick*, 1 *P. Wms.* 239.; *Mackell* v. *Temple*, 2 *Sho.* 288. *Vide Longford* v. *Eyre*, 1 *Wms.* 740. If the teſtator, though preſent at the time of the atteſtation, is in a ſtate of inſenſibility, it is inſufficient, *Right* v. *Price*, *Doug.* 241.

When the atteſtation only expreſſes that the teſtator ſigned in the preſence of the witneſſes, not adding that they ſubſcribed in his preſence, and the witneſſes are dead, it is a queſtion for the jury whether they were preſent or not, *Hands* v. *James*, *Comyns* 531.; *Croſt* v. *Pawlett*, 2 *Str.* 1109.

Witneſſes.

S. C. 5 Mod. 15. 3 Lev. 426, 427. Skin. 578. Holt 753. Caſes B. R. 72.

[*Vide* Title *Evidence and Proof*, p. 555.]

1. Dominus Rex *verſus* Croſby.

[Paſch. 7 Will. 3. B. R. 1 Ld. Raym. 39. S. C.]

ON a trial at bar for high treaſon, the priſoner, Mr. *Croſby*, took exception to *Aaron Smith*'s evidence, having ſtood in the pillory upon a judgment in an information againſt him for a libel. Mr. Solicitor and Mr. *Cowper* inſiſted, that the infamy flowed from the crime and not from the puniſhment, and that Mr. *Smith*'s crime was not infamous, nor did it deſerve ſuch puniſhment. *Holt*, C. J. without determining this point, held, that *Aaron Smith* was reſtored by the general pardon of 2 *W. & M.*, which operated by way of reſtoration, and made him a new creature. 3 *Lev.* 427. *Vide* the caſe of *Cheſter* verſus *Hawkins*, that the diſability flows from the infamous judgment, and not from the nature of the crime (*a*); for if a man be convict for a cheat, and adjudged to ſtand in the pillory, he cannot be a witneſs; otherwiſe if he be not adjudged to ſtand in the pillory Alſo they held the infamy was by the judgment to ſtand in the pillory, and not from the actually ſtanding there, and that he was diſabled to be a witneſs, though he never ſtood. *Nota*; In theſe caſes the diſability is a conſequence, and the pardon, which makes him *de cætero* a new creature, diſcharges all conſequences, dependencies, *&c.* And therefore, in the caſe of the King and *Weeden Ford*, *Mich.* 12 *W.* 3. *B. R.*, the queſtion being, Where the king could pardon the diſability, and where not? *Holt*, C. J. took this difference; where the diſability is only the conſequence of the judgment, the king may pardon it; but where the diſability is part of the judgment itſelf, the king's pardon will not take it away; therefore if a man be convict of perjury on the ſtatute, the king's pardon will not reſtore; for it is not a conſequence, but part of the judgment, *viz. quod impoſte-*

3 Salk. 461. 5 Mod. 74, 75.

Whether the infamy ariſes from the crime or judgment of the pillory. Q. Vide ante 461, 514. poſt. pl. 3. Fareſt. 101. Hob. 59. Raym. 74.

The king may pardon diſability where it is only conſequence of the judgment, otherwiſe where part of it; but in that caſe a ſtatute pardon will.

(*a*) It is now ſettled, that it is the infamy of the crime, and not the nature or mode of the judgment, that renders a witneſs incompetent; *vide poſt. pl.* 3. 5 *Mod.* 15. 2 *Wilſ.* 18, *Gilb. Ev.* former editions 139. laſt edition 257. If one attainted of treaſon is pardoned, it makes him a good witneſs, 5 *Mod.* 16. though before the pardon he would not be ſo.

rum non ſit receptus ut teſtis. Vide Co. Ent. 368. But a pardon by act of parliament will reſtore him in that caſe. *Quod nota.* *Quære* of a perjury at common law; and if the law be the ſame; for there the diſability is only a conſequence, and not part of the judgment; otherwiſe if a jury be convict in an attaint. *Raſt.* 86. *a.*

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2. Pitman *verſus* Maddox.

[Hill. 11 Will. 3. *Coram Holt*, C. J. *At* niſi prius *in* Middleſex. 1 Ld. Raym. 732. S. C.]

Shop-book allowed as evidence on proof of the ſervant's hand, who made the entries, he being dead. Vide ante 281, 285, 555. & Fareſl. 9. 6 Mod. 149. 1 Vent. 151. 6 Mod. 248. 1 Salk. 285, 286, 287 Fareſl. 129. S. C. Holt 298. Vide Bull. N. P. 283.

INDEBITATUS aſſumpſit on a tailor's bill; at the trial, *coram & per Holt*, C. J. a ſhop-book was allowed for evidence, it being proved that the ſervant that writ the book was dead, and this was his hand, and he accuſtomed to make the entries; and no proof was required of the delivery of the goods; and the Chief Juſtice ſaid, it was as good evidence as the proof of a witneſs's hand to an obligation; and he held, that though the ſtatute 7 *Jac.* 1. *c.* 12. ſays, A ſhop-book ſhall not be evidence after the year, *&c.*; that it is not of itſelf evidence within the year.

3. Dominus Rex *verſus* Ford.

[Mich. 12 Will. 3. B. R.]

Priſoner having eſcaped may be a witneſs to prove the eſcape voluntary, upon traverſe of an inquiſition for the office againſt the gaoler. Poſt. pl. 5. Vide 4 Bur. 2251.

UPON a ſpecial commiſſion iſſued out of Chancery, an inquiſition was taken, which found, that *Weedon Ford* had committed five voluntary eſcapes. *Ford* traverſed, and upon the trial, one who was ſuffered to eſcape, but was returned again, was produced to be a witneſs: And it was objected, that this was to ſave his own bond which he had given to be a true priſoner, and would entitle him to an action of falſe impriſonment againſt the marſhal, and compared it to the caſe of an uſurious bond. *Sed per Cur.* The bond given by the priſoner is a collateral matter to the eſcape; and the conſequence of his evidence as to that bond is not material to diſable his being a witneſs; and it is not like the caſe of uſury; for that renders the bond void; and this is a matter privately tranſacted between the party and the officer, of which there can be no other evidence.

2dly, That this witneſs was convict of barretry, and the record produced; but the judgment was, to be fined 500 marks, and not to ſtand in the pillory. On the other ſide it

it was argued, that a bare conviction of perjury would take away one's evidence, becauſe it is an infamous crime; but not ſo of barretry, which was not of an infamous nature, without an infamous puniſhment, as the pillory. *Curia contra.* He is diſabled by the conviction, for it is not the nature of the puniſhment, but the nature of the crime and conviction, that creates the infamy.

The nature of the crime and conviction, not of the puniſhment, makes the infamy. Vide ante pl. 2. 2 Wilſon 28.

Then it was inſiſted, that he was pardoned by the late general pardon. *Et per Holt*, C. J. If one be convict of perjury upon the ſtatute (*a*), he cannot be reſtored to his credit by the king's pardon: for, by the ſtatute, it is part of the judgment that he be infamous and loſe the credit of teſtimony; but he may by a ſtatute-pardon. But in other caſes, where the infamy is only the conſequence of the judgment, the king's pardon may reſtore the party to his teſtimony. Held upon a trial at bar.

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Perjury. Vide ante 513, 514, 689. 6 Mod. 168. 1 Hawk. P. C. cap 69.

(*a*) Otherwiſe where convict on an indictment *at common law*, 3 *Salk.* 155.

4. Anonymous.

[Paſch. 13 Will. 3. B. R.]

IF a witneſs going to ſea be by rule of Court examined upon interrogatories before a judge, and the trial come on before he is gone, his depoſition ſhall not be read, but he muſt appear; for the rule was made on ſuppoſal of his abſence.

Depoſition of a witneſs examined before a judge, becauſe going beyond ſea, cannot be read if he be in England. Vide ante 555, &c. ib. Bull. N. P. 239.

5. *Inter* Oxenden Bar. *and* Penerice.

[In Canc.]

A Queſtion was in Chancery, Whether a legatee could be a witneſs againſt a will? *Et per Cur.* upon debate, The reaſon why a legatee is not a witneſs for the will, is becauſe he is preſumed to be partial in ſwearing for his own intereſt: But the legatee, when he ſwears againſt the will, ſwears againſt his intereſt, and ſo is the ſtrongeſt witneſs.

Legatee may be a witneſs againſt a will. Vide ante pl. 3.

Vide ante 548, 651.

Words in General.

1. Smith *verſus* Wood.

[Mich. 5 W. & M. B. R.]

To call H. whoremaſter, is ſuable in the Spiritual Court. Vide 3 Lev. 17, 18, 119, 137. 2 Lev. 63. 3 Keb. 58. 1 Lev. 116. 1 Sid. 433. 1 Jo. 44. 3 Lev. 350. S. C. Comb. 226. Skin. 390. So of wittal. 2 Lev. 66. 1 Mod. 23.

LIBEL in the Spiritual Court for theſe words, *You are a rogue, raſcal, whoremaſter, and ſon of a perjured affidavit-bitch.* *Selby* moved for a prohibition; and all the words being waived but the word *whoremaſter*, he urged, that it was only a word of heat, and that words of paſſion were not defamatory, being regarded by the hearers no more than the words of one *non compos*, or mad; *ira furor brevis eſt.*

Holt, C. J. To ſay *whoremaſter* of a man is the ſame with *whore* of a woman, which is an eccleſiaſtical ſlander. *Et per Selby*, The reputation of a man is not ſo nice; but the Court would not diſtinguiſh them, and therefore denied the prohibition. *Holt*, C. J. ſaid, To call a man cuckold was not an eccleſiaſtical ſlander, but *wittal* was; for it imports his knowledge and conſent to his wife's adultery. *Vide* 1 *Sid.* 248. *Cro. Car.* 339.

Impudent brazen-faced Belzebub, not ſuable. Comb. 26, 28, 29.

Impudent brazen-faced Belzebub are not ſuable in the Spiritual Court, for they import paſſion, but no crime nor diſcredit any more than *Devil*, or *Prince of Darkneſs.*

2. Coxeter *verſus* Parſons.

[Hill. 10 Will. 3. B. R. 1 Ld. Raym. 423. S. C.]

Suit lies not in the Spiritual Court for words, charging an offence not puniſhable there. Vide Fareſl. 31. S. C. Caſe. B. R. 231. 2 Lev. 41. Godb. 447. 2 Rol. 295.

DOctor *Parſons* libelled againſt *Coxeter* in the Spiritual Court, for ſaying of him, *he had no ſenſe, was a dunce, and a blockhead; and he wondered the biſhop would lay his hands upon ſuch a fellow, and that he deſerved to have his gown pulled over his ears:* And a prohibition was granted; for a parſon is not puniſhable in the Spiritual Court for being a knave or a blockhead, more than another man; and whereas it was urged, that a parſon might be deprived for want of learning; the Chief Juſtice ſaid, If that be the caſe he muſt bring his action at law; for that was a temporal damage. And a prohibition was granted.

3. Acebery *verſus* Barton.

[Paſch. 4 Ann. B. R.]

A Woman libelled in the Eccleſiaſtical Court againſt another for theſe words, *you are a brandy-noſed whore, you ſtink of brandy*: Mr. *Earle* moved for a prohibition, inſiſting, they rather charged intemperance than incontinence. *Vide* 2 *Ro. Ab.* 296. *placito* 15. 1 *Jo.* 44. 1 *Cro.* 110. 2 *Keb.* 334, 57, 581. 1 *Sid.* 433. 1 *Mod.* 23. 3 *Lev.* 119. *But the Court denied a prohibition.*

Words of incontinence.

Comyns, Prohibition G. 14.

Words actionable or not actionable.

1. Taſſan *verſus* Rogers.

[Mich. 1 W. & M. B. R.]

CASE for words of a butcher, on a *colloquium* of the cow and the fleſh, that the *cow died with calving, per quod* he loſt ſuch and ſuch cuſtomers. Verdict and judgment *pro quer.* in the *Marſhalſea*; but on a writ of error it was reverſed here; for the words are not actionable; and the ſpecial damage does not help it; for it is not ſaid he could not ſell the reſt of his cow, but that he loſt cuſtomers.

Words of a butcher, that the cow died a calving, per quod he loſt his cuſtomers, not actionable. Comb. 161.

2. Byron *verſus* Elmes.

[Mich. 8 Will. 3. B. R.]

IN caſe for words, the plaintiff declared, that ſhe being a young woman, the defendant, to hinder her marriage, ſaid, *what did you go to* London *for, but to drop your ſlink? She went to* London *laſt winter to lie in, and to my knowledge ſeveral people have lain with her.* And they were held not actionable; for it is not having a baſtard, but the fornication is the crime here, and that being puniſhable in the Spiritual Court, is not puniſhable here without a temporal loſs. Having a baſtard was never actionable before

Charge of fornication not actionable without ſpecial damage. S. C. Comb. 391. Caſes B.R. 106. 1 Rol. 34, 36. 1 Sid. 396.

fore the ſtatute; nor is it ſince, unleſs the parties come within the penalty of the ſtatute, which is only when the pariſh is chargeable.

3. Anonymous.

[Mich. 8 Will. 3. B. R.]

She had a baſtard, not actionable, becauſe it do not appear that was chargeable to the pariſh. 1 Vent. 4. Comb. 137. S. C. 292. 3 Sid. 396. 2 Sid. 7, 21. 1 Rol. Abr. 34, 37, 38. Palmer 398.

CASE for theſe words, *ſhe had a baſtard child*, and verdict for the plaintiff; and the Court thought them not actionable, according to *Salter* and *Brown*'s Caſes. *Cro.* . and denied *Anne Davies*'s Caſe, 4 *Co.* 16. *b.* for ſhe is not puniſhable at common law in the king's temporal courts for having a baſtard; nor is ſhe puniſhable by 18 *Eliz.* unleſs her baſtard be likely to become chargeable to the pariſh; the ſtatute only extends to ſuch baſtards. In other caſes ſhe is only puniſhable in the Spiritual Court for whoring, and may ſue there, but cannot ſue here too; for the party would be doubly puniſhed by that means. *Sed adjournatur.*

S. C. 5 Mod. 398.

4. Savage *verſus* Robery.

[Paſch. 10 Will. 3. B. R.]

Cheat, ſpoke of a trader, not actionable without laying a colloquium of his trade. 1 Lev. 280. Comber. 292. 3 Keb. 34. 3 Lev. 5, 62. Stil. 420. 3 Mod. 112. Comyns, Action for Defamation, G. 3.

THE plaintiff declared, that he was a trader, and the defendant ſaid of him, *you are a cheat, and have been a cheat for divers years.* Upon the firſt motion, which was *Mich.* 9 *Will.* 3. *B. R. Holt*, C. J. held, the words muſt be underſtood of his way of living, and that it needed no *colloquium.* But *Paſch.* 10 *W.* 3. *B. R. Mutata opinione*, judgment was arreſted (*a*). *Vide* 1 *Vent.* 117, 263. 2 *Saund.* 307. *Jones* 156. *Raym.* 62, 169.

(*a*) *R. ac. Str.* 696. *Vide Str.* 797, 1169.

5. How *verſus* Prinn.

[Mich. 1 Ann. B. R. 2 Ld. Raym. 812. S. C.]

Do not vote for him, for he is a Jacobite, and for bringing in the Prince of Wales and Popery, to deſtroy our : a. tion, ſpoken of a juſtice of peace

THE plaintiff declared, that being a juſtice of peace and deputy-lieutenant, and having ſerved as knight of the ſhire for the county of *Glouceſter*, and intending to ſtand candidate again to be knight of the ſhire for the ſaid county, the defendant in diſcourſe with *J. S.* ſpeaking of the plaintiff and his ſtanding candidate, ſaid, *Do not vote for him, for he is a* Jacobite, *and for bringing in the Prince*

of

of Wales *and Popery, to deſtroy our nation.* Verdict for the plaintiff, and entire damages.

and deputy lieutenant; held actionable. 2 Mod. 26. 3 Lev. 30. S. C. 2 Lutw. 1293. N. L. 410. Far. 307. Holt 652. Fareſl. 107. S. C. Lutw. 1294.

In arreſt of judgment it was objected,

1ſt, That it was incertain where the Prince of *Wales* ſhould be brought in.

* 2dly, That there was no ſuch perſon, and the Court could take no notice of him.

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3dly, He might mean it legally by act of parliament.

4thly, He is not charged with any act.

5thly, The offices recited were not offices of profit.

Sed per Cur.:

1ſt, The words being ſpoken with reſpect to an *Engliſhman*, therefore the *bringing in* muſt be ſuppoſed to be into *England*; the rather, becauſe it is ſaid to be, to deſtroy our nation; and the defendant could not have been found guilty, if he had appeared upon trial to be a *Dutchman*, as in *Cromwell*'s caſe, *Thou art a murderer*; upon evience, it appeared to be ſpoke in the ſenſe, *a murderer of horſes*; and the defendant was acquitted.

2dly, We will take notice of the Prince of *Wales*, not as really ſuch, but pretendedly ſuch, being mentioned in acts of parliament; and one may gain a name by reputation, as a baſtard does that of his reputed father.

3dly, We cannot ſuppoſe he can mean to do this fairly; but if he does, it is ſcandal; for the king and government being Proteſtant, it is good reaſon for them to diſplace him, as not fit to be truſted.

4thly, As to his not being charged with any act, inclination and principles are ſufficient without an act. 3 *Lev.* 90. 1 *Brownlow* 5. *March* 4. 1 *Ro.* 86. *Ellis*'s caſe, and ſo was Sir *Tho. Clargis*'s caſe.

In offices of profit, words imputing want of ability are actionable; otherwiſe in offices of honour. Vide poſt. 698. Cro. Car. 213. Vide 1 Str. 617. 2 Ld. Raym. 1396. 3 Wilſ. 177.

5thly, In offices of profit, words that impute either defect of underſtanding, of ability, or integrity, are actionable; but in thoſe of credit, words that impute want only of ability, are not actionable, as of a juſtice of the peace: *He a juſtice of peace! He is an aſs, and a beetle-headed juſtice: Ratio eſt*, becauſe a man cannot help his want of ability, as he may his want of honeſty; otherwiſe where words impute diſhoneſty or corruption; as in this caſe, where the office is an office of credit, and the party charged with inclinations and principles which ſhew him unfit, and that he ought to be removed, which is a diſgrace (*a*).

(*a*) Judgment for the plaintiff affirmed in the Houſe of Lords, 7 *Mod.* 113. 1 *Bro. P. C.* 97.

S. C. 6 Mod. 23. Holt 654.

6. Baker *verſus* Pierce.

[Mich. 2 Ann. B. R. 2 Ld. Raym. 959. S. C.]

You ſtole my boxwood, and I will prove it, actionable. Vide prox. page 68. 6 Mod. 104. 2 Jon. 11, 68, 195, &c. Poph. 211. 1 Mod. 22. 2 Lev. 280. Cro. Jac. 39, 2, 43, 8, 312, 13, 231, 11, 442, 16. 2 Keb. 181. 1 Lev. 205. 1 Sid. 324. 3 Lev. 166. Hob. 305. All. 11. con. Cro. Jac. 430.

YOU *ſtole my boxwood, and I will prove it*, were held actionable, for they tend to diſgrace the plaintiff with an imputation of felony, and may be ſo underſtood. Theſe ſort of actions ſtand upon their own bottom, and are under no ſet rule, but ought to be encouraged to prevent breaking the peace. *Thou * art a thief, and haſt ſtolen my wood*, are actionable, there is no difference between *and* and *for*. To ſay *a man has the pox*, is not actionable; but to ſay farther, *and got it of a yellow-haired wench* in *Moorfields*, are actionable; not that the intendment is neceſſary that he meant the *French-pox*, but the ſenſe leaned that way.

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7. Graves *verſus* Blanchet.

[Paſch. 3 Ann. B. R.]

See 4 Co. 17, &c. Mod. Caſ. 148. S. C. 1 Vent. 4. 1 Sid. 396. Hob. 256. 1 Cro. 436. Andrews 376.

ACTION for theſe words, *She is a whore, and had a baſtard by her father's apprentice*; judgment was arreſted. The Court ſaid they could not overthrow ſo many authorities. The reaſon of the law is, that fornication is a ſpiritual offence; and no action lay at common law for what the common law took no notice of, without ſpecial damage.

8. Walmſley *verſus* Ruſſel.

[Trin. 3 Ann. B. R.]

There goes your rare chancellor to ſuborn witneſſes to ſwear againſt the parſon, not actionable. Vide 3 Lev. 166. 1 Co. 55, 16. S. C. 6 Mod. 200.

Vide 1 Rol. 52.

IN *caſe for words*, the plaintiff in his declaration ſhewed, that he was chancellor to the biſhop, and ſtood for parliament-man, and the defendant to defame him ſaid, *There goes your rare chancellor to ſuborn witneſſes to ſwear againſt the parſon*. *Powys* and *Gould*, Juſtices, held them actionable, becauſe they touched him in his office, and ſuborning is to be taken in *malam partem*; and the words were the falſer if there was no perjury or ſwearing. *Vide* 3 *Cro.* 93. 1 *Lev.* 118, 180. 1 *Cro.* 14, 15, 190. *Hard.* 103, 501. *Mo.* 243. 1 *Vent.* 20. 1 *Ro.* 79. *Holt*, C. J. and *Powell*, J. *contra*, To ſay, a man is forſworn is not actionable; *a fortiori*, to ſay one ſuborned another to forſwear: *Suborning* is not a crime of itſelf, but as it relates to perjury, and there cannot be a ſubornation of perjury or ſwearing, but where there is perjury and ſwearing.

Here

Here is nothing ſaid that relates to his office, or touches it; *there goes your rare chancellor*, is only a deſcription of the perſon.

9. Turner *verſus* Ogden.

S. C. 6 Mod. 104. Holt 40.

[Hill. 3 Ann. B. R.]

THOU art one of thoſe that ſtole my Lord Shafteſbury's *deer*; held not actionable; for though impriſonment be the puniſhment in thoſe caſes, yet *per Holt*, C. J. It is not a ſcandalous puniſhment. A man may be fined and impriſoned in treſpaſs; for there muſt not only be impriſonment, but an infamous puniſhment; it is true, calling *Papiſt* has been held actionable, but that was only in reſpect of the times.

Words ſubjecting H. to puniſhment may not be actionable, unleſs ſcandalous. See 6 Mod. 23, & ante 695. 1 Jon. 196. 2 Vent. 265. 1 Roll. Abr. 60. Yelv. 64. 2 Sho. 32. Cro. Eliz. 297.

10. Speed *verſus* Perry. [697]

[Trin. 4 Ann. B. R. 2 Ld. Raym. 1185. S. C.]

CASE for theſe words, *You are a raſcal, and a villain, you have forgot ſince you lived in the* Black-bull *yard; there you could procure broad money for gold, and clip it when you had ſo done, and then the ſhears could go.* Serjeant *Darnell* moved in arreſt of judgment, becauſe the words imputed no act, but a power only. *Sed per Cur.* Where the matter imputed is confined to a particular place, *as you could in ſuch a place*, they muſt be underſtood to imply an act; for a power is the ſame in all places. And *Powell* cited the caſe of *Horne* and *Powell*, *Trin.* 12 *Will.* 3. *C. B. You may well ſpend money at law, for you can coin money out of halfpence and farthings*, which was held to import an act done, becauſe by a bare power he could never be able to ſpend money at law; and the Court denied. 1 *Ro.* 72. *placito* 9. (*a*)

In Black-bull yard you could procure broad money for gold, and clip it; held to import an act, and actionable.

(*a*) *Vide Peake* v. *Oldham*, *Cowp.* 275.

Words indictable and not indictable.

1. Domina Regina *verſus* Langley.

[Hill. 2 Ann. B. R. 2 Ld. Raym. 1029. S. C.]

Words of ſlander ſpoken of a mayor, not indictable; otherwiſe if written. Comb. 46, 66. S. C. 6 Mod. 124. 5 Salk. 190. Holt 654. Vide Str. 420.

INDICTMENT for ſaying to the mayor of *Saliſbury*, *You, Mr. Mayor, I care not a fart for you*; and at another day; *You are a rogue and a raſcal.* On demurrer, Mr. *Ward* argued, they were not ſpoken while he was in the execution of his office, and that this is no offence indictable. *Vide* 1 *Ro. Rep.* 79. 11 *Co.* 95. 3 *Cro.* 78, 689. *Mo.* 247. 1 *Vent.* 16. *Vide cont.* 1 *Cro.* 503, 504. 2 *Bulſt.* 139, 140. 3 *Mod.* 139. *Holt*, C. J. Theſe words are not indictable, for the mayor was not in execution of his office nor a patent officer. It might be more doubtful if the words were of a patent officer; for then it is an aſperſion to the queen and government that employs him. Here it does not appear the mayor was a juſtice of peace; at leaſt not by commiſſion from the king; yet if theſe words had been written, an indictment would have lain. *Vide* 1 *Sid.* 270. 1 *Lev.* 139. *Et per totam Curiam*, Words that directly tend to the breach of the peace, as if one man challenge another, are indictable; and the commiſſion of *oyer* and *terminer de propalationibus verborum*, is to be conſtrued of words againſt the government, or *ſcandalum magnatum*, &c. But for theſe *petit offences*, which are *contra bonos mores*, the law has another proviſion, by requiring ſurety for the peace and good behaviour; in default whereof the magiſtrate may commit him, when ſpoken out of court; and when in court, then the magiſtrate may proceed ſummarily againſt him, and fine him for the contempt (*a*). Quaſhed.

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Clauſe de verborum propalationibus in the commiſſion of oyer and terminer, what it refers to.

(*a*) Or commit him, 7 *Mod.* 29. 3 *Salk.* 198. *Wood's Inſt.* 447, 486. 11 Co. 43.

Vide Cro. Car. 223.

2. Domina Regina *verſus* Wrightſon.

[Paſch. 7 Ann. B. R.]

Words of a juſtice of peace: He is a fool, an aſs, and a coxcomb, and knows no

INDICTMENT for ſaying of Sir *Rowland Gwyn*, who was a juſtice of peace, in diſcourſe concerning a warrant made by him, Sir *Rowland Gwyn is a fool, an aſs, and a coxcomb, for making ſuch a warrant, and he knows*

no

no more than a ſlickhill, held naught on demurrer. The Court held, that here was a breach of good manners, and he might be bound to the good behaviour; but here was no indictable offence. The counſel urged, that though words ſpoken of a magiſtrate in the execution of his office, might be indictable as a matter that diſturbs the public peace; yet not when it refers to ſome particular act. *Vide* 2 *Keb.* 494. *Hutt.* 131. 1 *Cro.* 362. 3 *Mod.* 139. 1 *Vent.* 169. And *Domina Regina* verſus *Soley*, *Mich.* 4 *Ann. B. R.* who was indicted for theſe words, *He is not fit to be a juſtice; for if a man is before him, he will give it right or wrong where his affection is*; and ruled the indictment lay not. *Et per Holt*, C. J. To ſay, *a juſtice is a fool*, or *an aſs*, or *a coxcomb*, or *a blockhead*, or a *bufflehead*, is not indictable; *quod fuit conceſſ. per Powell. Vide* 2 *Ro. Rep.* 78. 4 *Inſt.* 181.

more than a ſlickhill, not indictable, but cauſe to bind to the good behaviour. Cro. Jac. 56, 1, 58, 4, 240, 6, 484, 3, 557, 3. S. C. Rep. A. Q. 166. Holt 354. Ante 695.

Vide Str. 420, 1158.

Writ.

[699]

Vide ante Mandamus, Repleviu, Returns. Hob. 83.

1. Touchin's *Caſe*.

S. C. 1 Salk. 48, 49. 6 Mod. 164. & 276 to 287.

[Mich. 12 Will. 3. B. R. Vide *title* Amendment.]

IN all continued writs the *alias* muſt be teſted the day the former was returnable. *Vide ante* 554.

State Trials 659 to 706.

2. Dominus Rex *verſus* The Mayor of Hertford.

[Mich. 11 Will. 3. B. R.]

INFORMATION in nature of a *quo warranto*; a *venire* iſſued returnable in *Eaſter-term*, and a *diſtringas* in *Trinity*, and an *alias diſtringas* fifteen days from the *teſte* the ſame *Trinity term*: It was objected, that this was irregular, for that all proceſs on the crown ſide is returnable *de termino in terminum*, and not in fifteen days, and the precedents are ſo: It was anſwered, that proceſs of outlawry was the only proceſs returnable *de termino in terminum*. *Vide* 2 *Inſt.* 550. 1 *Inſt.* 134. 9 *Co.* 119. *b.* [*Note*; Theſe authorities are general, and make no diſtinction.] *Holt*, C. J. ſaid, There was no queſtion but the proceſs might

Proceſs out of the Crown-office may be returnable in fifteen days, except of outlawry, which muſt be *de termino in terminum*.

Quoad the proceſs, vide 2 H. P. C. 284. fol. edition.

might be ſued out returnable in fifteen days; and Sir *Samuel Aſtry* reported the practice according to this diverſity.

S. C. Ante 431, 432.

3. Dominus Rex *verſus* The Mayor, &c. of Abingdon.

[Paſch. 12 Will. 3. B. R. 1 Ld. Raym. 559. S. C.]

Writ of mandamus ought to be directed to the perſons who are to do the act. Vide poſt. pl. 6. Mod. Caſes 133.

Vide Str. 55, 640. Comyns, Mandamus, C. 1.

[700]

A *Mandamus* was directed *Jacobo Courteen majori, balliviis, & omnibus principalibus burgenſibus burgi de Abingdon*, who by the conſtitution were to chuſe the mayor out of ſuch perſons as ſhould be propoſed by the commonalty, commanding them to chuſe accordingly. It was objected to the writ, that it was miſdirected; for that this was but a part of the corporation, *viz.* chief burgeſſes; whereas the name of the corporation was, mayor, bailiffs, and burgeſſes; and it was urged that perſons conſtituting a corporation could be conſidered but in one of theſe two capacities, *viz.* their corporate or their natural; and that the writ muſt be directed to them, either by their names, or as a corporation; and they cited *Holt*'s caſe, 2 *Jones* 52. in point. *Holt*, C. J. ſaid, That caſe was not law; that Serjeant *Pemberton*, Sir *William Jones*, and all the learned part of the bar, wondered at the reſolution: And though it ſhould be true, that a mandatory writ might be directed to the whole corporation, yet it could not be neceſſary if ſhould be directed to more than thoſe, or that part of the corporation that was concerned in the execution of the thing required; for it is not in the power of others to put the command of the writ in execution: And the writ was held good.

S. C. Fareſt. 29. Holt 761. 3 D. 121. p. 6. Ante 273.

4. Shirley *verſus* Wright.

[Trin. 1 Ann. B. R. 2 Ld. Raym. 775. S. C.]

Writ of execution returnable two terms from the teſte, is well; meſne proceſs, void.

IN *debt* for an eſcape of one taken upon a *ca. ſa.* which appeared to be returnable the term next but one after the *teſte*, ſo that a term intervened. After a verdict for the plaintiff, it was moved in arreſt of judgment, that the writ was merely void, and conſequently there could be no eſcape, and the ſheriff did well to let him go; and 3 *Cro.* 468. was cited as a caſe in point. On the other ſide, to ſhew that a writ may be faulty, and yet not void, were cited *Poph.* 271. *Dy.* 67, 175. 21 *H.* 7. 16. *Sty.* 339. 1 *Ro.* 242. 3 *Cro.* 188. *Mo.* 274. 1 *Cro.* 271. 2 *Bulſt.* 256. 2 *Ro. Rep.* 432. *Per Holt*, C. J. Eſcape lies againſt the ſheriff; and there is a difference between a *capias* in mean proceſs,

proceſs, and a *capias* in execution: In mean proceſs, if a term be omitted the writ is void in all actions perſonal (*a*); and the ſheriff ſhall not be charged; for the cauſe is diſcontinued and out of court by the intermiſſion; and by not having a day in court by the return of the writ as he ought, the party may be at great prejudice by reaſon of the impriſonment in the mean time.

But in executions, a *ca. ſa.* omitting a term, is not void; for the party is not to have a day in court; his cauſe is at an end, and he muſt be in priſon, whether the writ be returned, or not; nor is it neceſſary it ſhould be returned. *Per Curiam.* The plaintiff had judgment, *niſi*, &c. 1 Lev. 254. 1 Saund. 161, 162. 2 Lev. 109. Writ bearing teſte out of term is void, but the ſheriff is juſtifiable.

And in the ſame caſe, *Holt*, C. J. ſaid, If a writ of execution bear *teſte* out of term, the ſheriff is juſtifiable, and yet ſhall not be liable to an action of eſcape, for it is a void writ.

(*a*) *R. ac. Parſons* v. *Lloyd*, 2 *Bl. Rep.* 846. 3 *Wilſ.* 341.

5. Helliot *verſus* Selby. [701]

[Trin. 2 Ann. B. R. 2 Ld. Raym. 902. S. C.]

IN *replevin* the declaration was, that the defendants *ſummoniti fuerunt ad reſpondend. de placito captionis & injuſtæ detentionis averiarum ipſius*, &c. The defendant avowed, and the plaintiff pleaded in bar, and the defendant made a naughty rejoinder, upon which it was demurred. And now *Weld* took exception to the original, that it was nonſenſe, and that there was no ſuch word as *averiarum*. *Holt*, C. J. If the original had been *averiarum*, it had been naught; but this is only a recital of an original, and the Court will not judge upon a recital; but the way to take advantage is, to crave *oyer*; for this recital is only a ſhort intimation to the Court of what the kind of the plea is. *Powell*, J. A replevin may be by plaint in the county, as well as by original here, becauſe it is *ſummonitus*. And if this caſe had been here by error out of the Common Pleas, in which caſe the plaintiff could not have taken advantage of this fault by (*a*) *oyer*, then he muſt have alleged diminution and prayed a *certiorari*; and if the original returned had been ſo, the Court would have reverſed the judgment. Defendant cannot take advantage of an ill original by the recital, but upon oyer or certiorari. Vide ante 4, 7, 658. 6 Mod. 28. S.C. 3 Salk. 355. Vide H. Bl. 250. Str. 225.

(*a*) Query if it ſhould not be "without *oyer*?"

6. Domina Regina *verſus* The Mayor, &c. of Hereford.

[Trin. 4 Ann. B. R.]

Writ of mandamus ought to be directed to the perſons who are to do the act. Vide ante 431, 477, & 595. pl. 3. Mod. Caſes 133, 309. S. C 6 Mod. 309. Rep A.Q. 288. Vide Str. 55.

A *Mandamus* to admit one to the office of town-clerk was directed to the mayor and aldermen of *Hereford*; and Mr *Eyres* urged the writ ought to be directed to the body politic, in whom the inheritance of the franchiſe was, by the name of incorporation, and that was, mayor, aldermen, and citizens; and indeed the writ was returned by the mayor, aldermen, and citizens in this caſe, and cited 3 *Bulſt.* 190. *Holt*, C. J. denied that caſe, and ſaid, it is enough to direct the writ to thoſe that are to execute the writ, or do the thing required: Then it appeared the mayor only was to admit; whereas the writ was directed to the mayor and aldermen; and *Holt*, C. J. thought the word aldermen was ſurplufage, and the writ well enough; *Powell*, J. *contra*. Writs ought to be directed to thoſe, and to thoſe only that are to obey the writ: How will people know who are to obey the writ, if the direction is inſignificant or immaterial? If a writ be directed to the coroner and ſheriff, where it ought to be to one only, it is naught: *Powys* and *Gould*, Juſtices, agreed, and the writ was quaſhed.

[702]

7. Anonymous.

[Trin. 13 Ann. In Canc.]

Ne exeat regnum to ſtay H.'s going to Scotland ſince the Union. Of ne exeat regnum, ſee 2 Inſt. 54. 4 Mod. 179. 3 Mod. 127, 169. 2 Show. 227, &c. 1 Chan. Caſ. 115, 116. 2 Chan. Caſ. 245. Of homine replegiando's & withernams, vide tit. Replevin. Vide ante 581. Fareſt. 9.

A *Ne exeat regnum* was granted to ſtay the defendant from going to *Scotland*; for though that is not out of the kingdom, yet it is out of the reach of the proceſs of this Court, and within the ſame miſchief (*a*).

Note; A writ of covenant is not amendable either by common law or by ſtatute. 1 *Salk.* 53.

(*a*) The condition of the recognizance ſhall be, that he does not go out of the realm or to *Scotland*, 1 *P. Wms.* 263. *S. C.* Mr. *Cox* has added a note to that report, by the name of *Done*'s caſe, of which the following is a copy:—"With reſpect to this writ, it has been determined, 1ſt, That it cannot be granted except on bill filed, *ex parte Brunker*, 3 *Atk.* 312. 2dly, That it ſhall not iſſue on a mere legal demand for which the defendant might have been holden to bail, *ex parte Brunker, ubi ſupra*; *Anon.* 2 *Atk.* 210. *Pearne* v. *Liſle*, *Ambler* 76.; *Atkinſon* v. *Leonard*, 3 *Bro. Ch.* 218.; but from the

the laſt-mentioned caſe it ſeems that it ſhall iſſue where the courts of law and equity have concurrent juriſdiction. It may alſo iſſue at the inſtance of a wife who is ſuing for alimony in the Spiritual Court, becauſe that Court cannot hold to bail, Sir *J. Smithſon's* caſe, 2 *Vent.* 345.; *Read* v. *Read*, 1 *Chan. Ca.* 115.; *Anon.* 2 *Atk.* 210.; *Pearne* v. *Liſle*, *ubi ſupra.* 3dly, The demand muſt be certain in its nature, *Anon.* 1 *Atk.* 521.; *Anon.* 1 *Bro. Ch.* 376. 4thly, That in general the application muſt be ſupported by an affidavit ſwearing poſitively to the debt, *Rice* v. *Gualtier*, 3 *Atk.* 501.; *Anon.* 2 *Vez.* 489.; but on bill for an account, it is ſufficient for the plaintiff to ſwear to the balance as to his belief, *Rice* v. *Gualtier*, *ubi ſupra.* Where the demand is againſt an adminiſtrator, *&c.*, the plaintiff ſhould alſo ſwear to his belief of aſſets come to the defendant's hands, *Anon.* 2 *Vezey* 489. 5thly, This writ may iſſue againſt a feme covert executrix, whoſe huſband is out of the juriſdiction, *Jerningham* v. *Glaſs*, 3 *Atk.* 409., and *Ambler* 62. *S. C.*; and *Moor* v. *Melliſh*, therein cited. 6thly, But as the real object of the writ, when applied to private concerns, is to compel the defendant to abide the event of the ſuit, the Court always inclines to diſcharge the writ upon ſuch ſecurity being given, *Baker* v. *Dumareſque*, 2 *Atk.* 66.; *Jerningham* v. *Glaſs*, *ubi ſup.*; *Robertſon* v. *Wilkie*, *Amb.* 177.; *Atkinſon* v. *Leonard*, *ubi ſupra.* Whether the writ ſhall iſſue againſt a foreigner or perſon uſually reſident out of the juriſdiction, in reſpect of a demand which originated abroad, and is there ſuable, *vide Pearne* v. *Liſle*, *Robertſon* v. *Wilkie*, and *Atkinſon* v. *Leonard*, *ubi ſupra.*

Pleadings to the Caſes.

Pleas before our Lord the King at Weſtminſter, *of the Term of* Eaſter *in the Seventh Year of the Reign of our Lord* William *the Third, now King of* England, *&c. Roll.* 242.

Sir John Dalſton *againſt* Janſon.

[3 Ld. Raym. Entries, 115. S. C.]

Salk. 10. 5 Mod. 90. Comb. 333. 3 Salk. 204. Caſes B. R. 73. Holt 7. S. C.

London, to wit. "BE it remembered, That heretofore, to wit, "in *Hilary* term laſt paſt, before the lord the "king, at *Weſtminſter*, came Sir *John Dalſton*, knight and "baronet, by *John Pratt* his attorney, and brought into "the court of our ſaid lord the king, then there, his cer- "tain bill againſt *Joſhua Janſon*, a common carrier, in "the cuſtody of the marſhal, *&c.*, of a plea of treſpaſs "upon the caſe, and there are pledges of proſecuting, to "wit, *John Roe* and *Richard Doe*, which ſaid bill follow- "eth in theſe words, to wit, *London*, to wit, Sir *John* "*Dalſton*, knight and baronet, complains of *Joſhua Jan-* "*ſon*, a common carrier, in the cuſtody of the marſhal "of the Marſhalſea of our lord the king, before the king "himſelf being, for that, to wit, That whereas the ſaid "*Joſhua*, on the ſixteenth day of *March*, in the year of "our Lord one thouſand ſix hundred and ninety-three, "and long before, and ever ſince, has been and ſtill is a "common carrier of goods and chatte·, and for his pro- "fit uſed to bear and carry the goods and chattels of all "perſons whatſoever requiring ſuch carriage, from *Wake-* "*field* in the county of *York* to *London*, and from *London* "aforeſaid to *Wakefield* aforeſaid, throughout all the ſaid "time for the reward to be had for the ſame. And "whereas by the law and cuſtom of this realm of *Eng-* "*land*, every common carrier of goods and chattels, who "receives goods and chattels ſo to be carried, is obliged "to preſerve and carry the ſame without any diminution "or loſs, ſo that by the default of ſuch common carrier "or his ſervant, no damage may any ways happen there- "unto. And whereas the ſaid Sir *John*, on the ſaid ſix- "teenth day of *March* in the year of our Lord one thou- "ſand ſix hundred and ninety-three aboveſaid, at *London* "aforeſaid, to wit, in the pariſh of Saint *Mary le Bow* in "the

A count on the cuſtom of the realm againſt a common carrier.

" the ward of *Cheap*, was poſſeſſed of the following goods
" and chattels, to wit, of one deal box, and one hundred
" pieces of golden coin called guineas, of lawful *Engliſh* [704]
" money, as of his proper goods and chattels: And the
" ſaid Sir *John* being ſo poſſeſſed on the ſaid ſixteenth day
" of *March* one thouſand ſix hundred and ninety-three
" aforeſaid, at *London* aforeſaid, to wit, in the pariſh and
" ward aforeſaid, delivered the ſaid box with the ſaid one
" hundred pieces of golden coin being in the ſame, to the
" ſaid *Joſhua*, to carry the ſame ſafely and ſecurely for
" hire from *London* aforeſaid to *Wakefield* aforeſaid, in the
" county of *York* aforeſaid, and there deliver the ſame to
" the aforeſaid Sir *John*: And the aforeſaid *Joſhua* then
" and there received and had the ſaid box, and the ſaid
" one hundred pieces of gold in the ſame being, to carry
" and deliver in manner aforeſaid: Nevertheleſs the ſaid
" *Joſhua* hath not at any time hitherto delivered the ſaid
" box with the ſaid one hundred pieces of gold in the
" ſame being, to the ſaid Sir *John*, but the ſaid box, and
" the ſaid one hundred pieces of gold coin in the ſame be-
" ing, afterwards, to wit, on the ſeventeenth day of
" *March* in the year of our Lord one thouſand ſix hundred
" ninety and three aforeſaid, at *London* aforeſaid, in the
" pariſh and ward aforeſaid, for want of the ſafe keeping
" thereof by the ſaid *Joſhua*, were deſtroyed and loſt.

" And whereas alſo, on the ſaid ſixteenth day of *March* Trover laid in the ſame held not joinable. 2 Wilſon 319. contra.
" in the year of our Lord one thouſand ſix hundred ninety
" and three aboveſaid, at *London* aforeſaid, to wit, in the
" pariſh and ward aforeſaid, the ſaid Sir *John* was poſſeſſed
" of the other goods following, to wit, of one deal box
" and one hundred pieces of golden coin called guineas, of
" lawful *Engliſh* money, as of his proper goods and chat-
" tels, and being ſo poſſeſſed, the ſaid Sir *John* afterwards,
" to wit, the ſame ſixteenth day of *March*, in the year of
" our Lord one thouſand ſix hundred ninety and three
" aforeſaid, at *London* aforeſaid, in the pariſh and ward
" aforeſaid, caſually loſt thoſe goods and chattels out of
" his hands and poſſeſſion, which ſaid goods and chattels
" afterwards, to wit, the ſame ſixteenth day of *March*,
" in the year of our Lord one thouſand ſix hundred ninety
" and three aboveſaid, at *London* aforeſaid, in the pariſh
" and ward aforeſaid, by finding came to the hands and
" poſſeſſion of the ſaid *Joſhua*: Yet the ſaid *Joſhua*,
" knowing the goods and chattels laſt before-mentioned
" to be the proper goods and chattels of the ſaid Sir *John*,
" and to him the ſaid Sir *John* of right to belong and ap-
" pertain, yet fraudulently contriving and intending craf-
" tily and ſubtilly to deceive and defraud the ſaid Sir *John*,
" hath not yet delivered the goods and chattels laſt before-

" mentioned to the ſaid Sir *John*, although often re-
" queſted, &c., but afterwards, to wit, the ſeventeenth
" day of *March*, in the year of our Lord one thouſand ſix
" hundred ninety and three aforeſaid, at *London* afore-
" ſaid, in the pariſh and ward aforeſaid, converted and
" diſpoſed of the goods and chattels laſt mentioned to the
" proper uſe and advantage of him the ſaid *Joſhua*, to the
[705] " damage of the ſaid Sir *John* of one hundred and fifty
" pounds: And therefore he brings this ſuit, &c.

Plea. " And now at this day, to wit, *Wedneſday* next after fif-
" teen days from the day of *Eaſter* in this ſame term, un-
" til which day the ſaid *Joſhua* had leave to imparle to the
" ſaid bill, and then to anſwer, &c. before the lord the
" king at *Weſtminſter*, comes as well the ſaid Sir *John*
" *Dalſton*, knight and baronet, by his attorney aforeſaid,
" as the ſaid *Joſhua* by *William Midgeley* his attorney, and
" the ſaid *Joſhua* defends the force and injury when, &c.,
" and ſaith that he is not thereof guilty. And of this he
" puts himſelf upon the country, and the ſaid Sir *John*
" *Dalſton* does ſo likewiſe, &c. Therefore let a jury
" come thereupon before the lord the king at *Weſtminſter*,
" on *Tueſday* next after one month from the day of *Eaſter*,
" and who neither, &c., to recognize, &c., becauſe as
" well, &c. The ſame day is given to the ſaid parties
" there, &c."

Pleas before our Lady the Queen at Weſtminſter, *of the Term of* St. Michael *in the Second Year of the Reign of our Lady* Anne, *now Queen of* England, &c. *Roll* 398.

The Earl of Banbury *againſt* Woods and his Wife.

Salk. 5. 6 Mod. 84. 3 Salk. 20. Holt 41. S. C.

London, to wit. " THOMAS *Woods* merchant, and *Mary* his " wife, were attached to anſwer *Charles* " Earl of *Banbury* and *Mary* Counteſs of *Banbury* his " wife, in a plea, why they took the ſaid counteſs, and " her ſo taken detain, &c. And whereupon the ſaid earl " and counteſs, by *Richard Longford* their attorney, com- " plain, that the ſaid *Thomas Wood* and *Mary* his wife, on " the twentieth day of *April*, in the ſecond year of the " reign of our Lady *Anne*, now Queen of *England*, &c., " at *London* aforeſaid, to wit, in the pariſh of *St. Helen* in " the ward of *Biſhopſgate*, the ſaid counteſs took, and her

" ſo

" ſo taken do yet hold and detain: Wherefore they ſay
" they are injured, and have damages to the value of ten
" thouſand pounds: And they bring this ſuit, *&c.*

" And the ſaid *Thomas Woods* and *Mary* his wife, by *Rich-*
" *ard Aſh* their attorney, come and crave *oyer* of the original
" writ aforeſaid, and of the return of the ſame writ; and
" they are read to them in theſe words, to wit, *Anne*, by [706]
" the grace of God, of *England*, *Scotland*, *France*, and
" *Ireland*, Queen, Defender of the Faith, *&c.*, to the
" ſheriffs of *London*, greeting: Whereas we have often-
" times commanded you, that you ſhould juſtly and with-
" out delay replevy *Mary* the wife of *Charles* Earl of *Ban-*
" *bury*, whom *Thomas Woods* merchant, and *Mary* his
" wife took, and her ſo taken do detain, as it is ſaid, un-
" leſs ſhe was taken by the ſpecial command of us, or of
" our Chief Juſtice, or for the death of any perſon, or for
" our foreſt, or for any other guilt, wherefore, accord-
" ing to the cuſtom of *England*, ſhe is not repleviable,
" leſt we ſhould further hear claim thereof for defect of
" juſtice; or that you would ſignify to us the cauſe why
" you would not or could not execute our mandate for-
" merly to you thereupon directed: And you deſpiſing
" our ſaid precepts, as we have been informed, have not
" hitherto taken care to replevy the ſaid *Mary* the wife of
" the ſaid earl, or to ſignify unto us the cauſe why you
" would not or could not do it; in manifeſt contempt of
" us and our mandates, and to the great damage and
" grievance of them the ſaid earl and counteſs, whereat
" we very much wonder and are moved. Still we com-
" mand and firmly enjoin you, that you replevy the ſaid
" *Mary* the wife of the ſaid earl, according to the tenor
" of our ſaid mandates to you before directed for that
" purpoſe, or that you yourſelves be before us from the
" day of *St. Michael* in one month, whereſoever we ſhall
" then be in *England*, to ſhew why our ſaid mandates ſo
" often to you directed, you have contemptuouſly refuſed
" to execute. And have you there this writ. Witneſs our-
" ſelf at *Weſtminſter*, the twenty-ſecond day of *June* in
" the ſecond year of our reign (*Cæſar*). By virtue of
" this writ to us directed, we do certify that no other
" writ or mandate of our ſaid lady the queen, of reple-
" vying the within-named *Mary* the wife of *Charles* Earl
" of *Banbury*, whom the within-named *Thomas Woods*
" and *Mary* his wife have taken, and her ſo taken do de-
" tain, as within ſpecified, than the writ of *pluries reple-*
" *vin* of the ſaid *Mary* the wife of *Charles* Earl of *Banbury*,
" came to our hands, or was delivered to us. And fur-
" ther we do certify to the ſaid lady the queen, that the
" ſaid *Mary*, the wife of *Charles* Earl of *Banbury*, is re-

" moved afar off to places to us unknown, by the ſaid
" *Thomas Woods* and *Mary* his wife, wherefore we can-
" not replevy the ſaid *Mary* the wife of the ſaid *Charles*
" Earl of *Banbury*, as we are within commanded. The
" anſwer of Sir *Gilbert Heathcote*, and *Joſeph Wolfe* Eſ-
" quire, ſheriffs.

" Which being read and heard, the ſaid *Thomas Woods*
" and *Mary* his wife demand judgment of the ſaid writ,
" becauſe they ſay that by the form of the ſtatute the ad-
" dition of the village, or hamlet, or place, and county,
" of the reſidence of the ſaid *Thomas* ought to be con-
" tained in the ſaid original writ of the ſaid *Charles* Earl
[707] " of *Banbury*, and *Mary* Counteſs of *Banbury* his wife:
" And this they are ready to verify. Wherefore becauſe
" ſuch addition is not contained in the ſaid writ, the ſaid
" *Thomas* and *Mary* pray judgment of the ſaid writ, and
" that the ſaid writ be quaſhed, *&c.*

" And the ſaid *Charles* Earl of *Banbury*, and the ſaid
" *Mary* Counteſs of *Banbury* his wife, ſay, that notwith-
" ſtanding any matter by the ſaid *Thomas* and *Mary* his
" wife above pleaded in abatement of the writ, the writ
" of the ſaid earl and counteſs ought not to be quaſhed,
" becauſe they ſay that the plea aforeſaid, by the ſaid *Tho-*
" *mas* and *Mary* his wife pleaded in manner and form
" aforeſaid, and the matter in the ſame contained, are not
" ſufficient in law to quaſh the ſaid writ of them the ſaid
" earl and counteſs. To which ſaid plea they the ſame
" earl and counteſs need not, neither are they in any man-
" ner bound by the law of the land to anſwer; and this
" they are ready to verify; wherefore for want of a ſuffi-
" cient plea in this behalf of them the ſaid *Thomas* and
" *Mary* his wife, they the ſaid earl and counteſs demand
" judgment, and that the writ of them the ſaid earl and
" counteſs may be adjudged good, and that the ſaid *Tho-*
" *mas* and *Mary* may further anſwer to the ſaid writ, *&c.*

" And the ſaid *Thomas Woods* and *Mary* his wife ſay,
" that the ſaid plea by them the ſaid *Thomas* and *Mary*
" in manner and form aforeſaid pleaded, and the matter
" therein contained, are good and ſufficient in the law to
" quaſh the ſaid writ of them the ſaid earl and counteſs,
" which ſaid plea and the matter therein contained, they
" the ſaid *Thomas* and *Mary* are ready to verify, as the
" Court, *&c.* And becauſe the ſaid earl and counteſs
" have not anſwered to the ſaid plea, nor have hitherto
" any ways gainſaid it, they the ſaid *Thomas* and *Mary*,
" as before, pray judgment of the aforeſaid writ, and that
" the ſame writ be quaſhed, *&c.*

" But becauſe the Court of the ſaid lady the queen now
" here, is not yet adviſed of giving their judgment of and
" concerning

" concerning the premiſes, day is therefore given to the " ſaid parties before the lady the queen, until ..... " whereſoever, &c., of hearing their judgment of and con- " cerning the ſaid premiſes, becauſe the Court of the ſaid " lady the queen now here, is not yet thereof, &c."

Pleas before our Lady the Queen at Weſtminſter, *of the Term of* St. Michael *in the Firſt Year of the Reign of our Lady* Anne, *now Queen of* England, &c. *Roll* 344. [708].

Haywood *againſt* Davies and others.

Middleſex, " BE it remembered, That on *Friday* next after three weeks from the day of *St.* *Far.* 104. *Salk.* 4. S. C.
to wit. " *Michael* in this ſame term, before the lady the queen at " *Weſtminſter*, comes *Rebecca Haywood* by *William Smyth* " her attorney, and brings into the court of the ſaid lady " the queen now here her certain bill againſt *Margaret* " *Davis*, otherwiſe *Daviſon*, and *Mary Bonner* in cuſtody " of the marſhal, &c., of a plea of treſpaſs, and there are " pledges of proſecuting, namely *John Doe* and *Richard* " *Roe*, which ſaid bill followeth in theſe words, that is to " ſay, *Middleſex*, to wit, *Rebecca Haywood* complains of " *Margaret Davis*, otherwiſe *Daviſon*, and *Mary Bonner* " in the cuſtody of the marſhal of the Marſhalſea of our " lady the queen, before the queen herſelf being, for that " they the ſame *Margaret* and *Mary*, on the firſt day of " *October*, in the firſt year of the reign of our lady *Anne*, " now Queen of *England*, &c., with force and arms, &c., " the cloſe and court-yard of the ſaid *Rebecca* in the pariſh " of *Stebunheath*, otherwiſe *Stepney*, in the county of *Mid-* " *dleſex* aforeſaid, broke and entered, and her the ſaid *Re-* " *becca*, in the quiet uſe and occupation of the ſaid cloſe " and court-yard, did then and there diſturb and hinder; " and alſo for that they the ſame *Margaret* and *Mary* af- " terwards, to wit, the day and year aforeſaid, with force " and arms, &c., another cloſe and court-yard of the " ſame *Rebecca*, in the pariſh and county aforeſaid, did " break and enter, and five hundred pails of water and " other water of the ſame *Rebecca*, to the value of twenty " ſhillings, from and out of a certain fountain of her the " ſame *Rebecca*, in the pariſh and county aforeſaid being, " without the licence of her the ſaid *Rebecca*, and againſt

Treſpaſs for breaking and entering of the plaintiff's cloſe and yard, and diſturbing the poſſeſſion.

" her

" her will, from and out of the fountain aforeſaid, then
" and there did take and carry away; and alſo for that
" they the ſame *Margaret* and *Mary* afterwards, to wit,
" the ſame day and year laſt aboveſaid, with force and
[709] " arms, *&c.*, a great quantity of dirt, ſoil, and water, in
" and upon the land and another court-yard of the ſame
" *Rebecca* in the pariſh and county aforeſaid, did then and
" there put, place, pour out, and caſt forth, and other
" enormities to the ſame *Rebecca* did then and there com-
" mit, againſt the peace of our ſaid lady the queen that
" now is, and to the damage of her the ſaid *Rebecca* thirty
" and nine ſhillings: And therefore ſhe brings this ſuit,
" *&c.*

Plea of tenancy in common in abatement.

" And the ſaid *Margaret* and *Mary* in their proper
" perſons come and defend the force and injury, *&c.* and
" pray judgment of the ſaid bill of her the ſaid *Rebecca*,
" and that the ſame bill may be quaſhed, becauſe they
" ſay that the cloſe and court-yard, and alſo the places
" in which the ſaid treſpaſſes are ſuppoſed to be done,
" are, and at the ſame time when, *&c.* were one acre of
" land, and that the ſaid *Rebecca* at the ſame time when,
" *&c.* had nothing in the ſame acre of land, unleſs to-
" gether and undividedly with the ſaid *Mary Bonner*, who
" is in full life at the pariſh of *Stepney* in the county of
" *Middleſex*: And this they are ready to verify. Where-
" fore they pray judgment of the ſaid bill, and that the
" ſame bill may be quaſhed, *&c.*

Replication.

" And the ſaid *Rebecca* ſaith, that the aforeſaid bill of
" her the ſaid *Rebecca*, for the reaſon before alleged,
" ought not to be quaſhed, becauſe ſhe ſaith ſhe, at the
" ſeveral times the ſeveral treſpaſſes aforeſaid are ſup-
" poſed to be committed, was ſole ſeiſed of the ſaid cloſe
" and court-yard in the declaration of her the ſaid *Re-*
" *becca* firſt mentioned, and alſo of the ſaid cloſe and
" court-yard in the declaration aforeſaid of her the ſaid
" *Rebecca* ſecondly mentioned, and of the aforeſaid foun-
" tain in that declaration in like manner mentioned, and
" alſo of the third court-yard in the ſaid declaration of
" the ſaid *Rebecca* thirdly mentioned, and that the afore-
" ſaid *Margaret* and *Mary*, at the ſaid ſeveral times when,

Traverſe of the tenancy in common.

" *&c.* did commit the ſeveral treſpaſſes aforeſaid, as the
" ſaid *Rebecca* by her ſaid declaration above complains
" againſt them; without that, that the ſaid *Mary Bonner*
" at the reſpective times aforeſaid, or any of them, had
" any thing in the ſaid premiſes, or any of them: And
" ſhe prayeth that this may be inquired by the country.

Demurrer.

" And the ſaid *Margaret Davis*, otherwiſe *Daviſon*,
" and *Mary Bonner* ſay, that the plea aforeſaid by her
" the ſaid *Rebecca Haywood*, in manner and form above

" by their ſaid replication pleaded, and the matter in the " ſame contained, are not ſufficient in law to compel " them the ſaid *Margaret* and *Mary* to anſwer the bill " of her the ſaid *Rebecca*, to which ſaid plea they the " ſame *Margaret* and *Mary* need not, neither by the law " of the land are they bound in any manner to anſwer: " And this they are ready to verify. Wherefore for want " of a ſufficient replication of the ſaid *Rebecca* in this be- " half, they the ſaid *Margaret* and *Mary* as before pray " judgment of the ſaid bill of her the ſaid *Rebecca*, and [710] " that the ſame bill may be quaſhed. And for cauſes of " demurrer in law in this behalf, according to the form " of the ſtatute in ſuch caſe lately made and provided, " the ſaid *Margaret* and *Mary* here ſhew to the Court " theſe cauſes following; For that the ſaid plea of her " the ſaid *Rebecca* is double, uncertain, and wants form, " and concludes to the country.

" And the ſaid *Rebecca Haywood* ſaith, that the plea Joinder in de- " aforeſaid, by her the ſaid *Rebecca* in manner and form murrer. " aforeſaid in her replication above pleaded, and the mat- " ter in the ſame contained, are good and ſufficient in " law to compel them the ſaid *Margaret Davis* and *Mary* " *Bonner* to anſwer the bill aforeſaid of her the ſaid *Re-* " *becca*; which ſaid plea, and the matter in the ſame " contained, the ſame *Rebecca* is prepared to verify and " prove as the Court, *&c.* And becauſe the ſaid *Marga-* " *ret* and *Mary* have not anſwered that plea, nor have " hitherto in anywiſe contradicted it, the ſame *Rebecca* " prays judgment; and that the ſaid *Margaret* and *Mary* " may further anſwer the ſaid bill of her the ſaid *Re-* " *becca*, *&c.* But becauſe the Court of our ſaid lady the " queen now here, are not yet adviſed of giving their " judgment of and concerning the premiſes, a day there- " fore is given to the ſaid parties before our lady the " queen at *Weſtminſter* until *Tueſday* next after eight days " from the day of *St. Martin*, for hearing their judgment " of and concerning the premiſes, for that the Court " of our ſaid lady the queen now here is not yet there- " of, *&c.*

" A *Reſpondeas ouſter* awarded."

Pleas before our Lady the Queen at Weſtminſter, *in the Term of* Saint Michael *in the Fifth Year of the Reign of our Lady* Anne, *now Queen of* Great Britain, *&c. Roll* 439.

Stroud *againſt* Lady Gerrard.

Salk. 2. S. C.

Middleſex, to wit. " BE it remembered, That on *Wedneſday* next after three weeks from the day of " *Saint Michael* in this ſame term, before our lady the " queen at *Weſtminſter*, cometh *Thomas Stroud* by *Daniel* " *Brown* his attorney, and produceth in the court of our " lady the queen that now is here his certain bill againſt [711] " the lady [or dame] *Elizabeth Gerrard*, otherwiſe *Gar-* " *rett*, in the cuſtody of the marſhal, *&c.* of a plea of " treſpaſs upon the caſe, and there are pledges of proſe- " cuting, to wit, *John Doe* and *Richard Roe*, which ſaid " bill followeth in theſe words, to wit, *Middleſex*, to wit, " *Thomas Stroud* complains of the lady *Elizabeth Gerrard*, " otherwiſe *Garrett*, in the cuſtody of the marſhal of the " *Marſhalſea* of our lady the queen before the queen her- " ſelf being; for that, to wit, that whereas the ſaid " *Elizabeth* on the tenth day of *October* in the fifth year

Indebitatus aſſumpſit for maſon's work and materials found.

" of the reign of our lady *Anne*, now queen of *England*, " *&c.* at the pariſh of *St. Clement Danes* in the county of " *Middleſex* aforeſaid, was indebted to the ſaid *Thomas* in " fifteen pounds of lawful *Engliſh* money, as well for " divers maſon's works by him the ſaid *Thomas* for the " aforeſaid *Elizabeth* at the ſpecial inſtance and requeſt of " the ſaid *Elizabeth* before then made and performed, as " for ſtone and other materials and neceſſaries in and " about the doing and performing the ſaid works uſed " and employed by him the ſaid *Thomas*, at the like in- " ſtance and requeſt of the ſaid *Elizabeth* found and pro- " vided; and being ſo thereupon indebted, ſhe the ſame " *Elizabeth* in conſideration thereof undertook, and did " then and there faithfully promiſe the ſaid *Thomas* that " ſhe the ſaid *Elizabeth*, when thereafter required ſo to " do, would well and faithfully pay and ſatisfy the ſaid

Quantum meruit for the ſame.

" fifteen pounds to the ſaid *Thomas*: And whereas alſo " the ſaid *Thomas*, afterwards, to wit, the ſame day and " year abovementioned, at the pariſh aforeſaid in the " county aforeſaid, at the like inſtance and requeſt of the " ſame *Elizabeth* had done and performed for the afore- " ſaid *Elizabeth* divers other maſon's works, and had " found and provided and uſed ſtones and other materials

" and

" and things neceſſary in and about the doing and per-
" forming of the ſaid works laſt mentioned; the ſaid
" *Elizabeth* in conſideration thereof, afterwards, to wit,
" the ſame day and year aforeſaid, at the pariſh aforeſaid
" in the county aforeſaid, undertook, and then and there
" faithfully promiſed the ſaid *Thomas*, that ſhe the ſame
" *Elizabeth* would well and truly pay and ſatisfy to the
" ſaid *Thomas*, when ſhe ſhould afterwards be re-
" queſted the ſame, as well ſo much money as the
" ſame *Thomas* ſhould reaſonably deſerve to have for
" the ſaid other maſon's works laſt mentioned, at the
" time of the doing and performing the ſame, as alſo
" ſo much money as the aforeſaid ſtones and other ma-
" terials and things neceſſary laſt mentioned, at the time
" of the finding and providing of the ſame were reaſon-
" ably worth: And the ſaid *Thomas* in fact ſaith, that he
" the ſaid *Thomas*, for the ſaid maſon's works laſt men-
" tioned, at the time of doing and performing the ſame,
" reaſonably deſerved to have other fifteen pounds of like
" lawful *Engliſh* money; and that the ſaid ſtones and
" other materials and things neceſſary laſt mentioned at
" the time of the finding and providing of them were
" reaſonably worth other fifteen pounds of like lawful
" *Engliſh* money, to wit, at the pariſh aforeſaid in the [712]
" county aforeſaid, of which the ſaid *Elizabeth* then and
" there had notice: And whereas alſo the ſaid *Elizabeth*,
" afterwards, to wit, the ſame day and year aboveſaid, at
" the pariſh aforeſaid in the ſaid county, was indebted to
" the ſaid *Thomas* in other fifteen pounds of like lawful
" *Engliſh* money, as well for other maſon's work for the
" ſaid *Elizabeth*, by the ſame *Thomas*, at the like ſpecial Indebitatus aſ-
" inſtance and requeſt of the ſame *Elizabeth*, before that ſumpſit as well
" time wrought and done, as for divers materials and for maſon's work
" things neceſſary, uſed in and about the ſame work by as materials.
" the aforeſaid *Thomas*, at the like inſtance and requeſt of
" the ſaid *Elizabeth*, before then bought, found, and pro-
" vided, as for divers ſums of money, for the ſaid *Eliza-*
" *beth*, by the ſame *Thomas*, at the like inſtance and requeſt
" of her the ſaid *Elizabeth*, before that time laid out and
" diſburſed; and being ſo indebted the ſaid *Elizabeth* af-
" terwards, to wit, the day and year aforeſaid, at the pa-
" riſh aforeſaid in the county aforeſaid, in conſideration
" thereof undertook, and then and there did faithfully
" promiſe the ſaid *Thomas*, that ſhe the ſame *Elizabeth*
" would well and faithfully pay and ſatisfy the ſaid laſt-
" mentioned fifteen pounds to the aforeſaid *Thomas*, when
" ſhe ſhould be thereunto afterwards requeſted: And
" whereas alſo the ſaid *Elizabeth* afterwards, to wit, the
" ſame day and year above mentioned, at the pariſh afore-
" ſaid

" ſaid in the county aforeſaid, in conſideration that the
" ſaid *Thomas*, at the like ſpecial inſtance and requeſt of
Indebitatus aſ- " the ſaid *Elizabeth*, had wrought and done for the ſame
ſumpſit for work. " *Elizabeth* other work belonging to a maſon, [or maſon's
" work,] took upon herſelf, and then and there did faith-
" fully promiſe the ſaid *Thomas*, that ſhe the ſame *Eliza-*
" *beth* would well and truly pay and ſatisfy twenty pounds
" of the like lawful money of *England*, for the ſaid laſt-
" mentioned work by the ſame *Thomas* for the ſaid *Eliza-*
" *beth* ſo wrought and done as aforeſaid, to the ſame *Tho-*
" *mas*, when thereunto after required: Yet the ſaid *Eli-*
Breach. " *zabeth* her ſeveral promiſes and aſſumptions aforeſaid in
" nowiſe regarding, but contriving and fraudulently in-
" tending the ſame *Thomas* in this behalf craftily and
" ſubtilly to deceive and defraud, the aforeſaid ſeveral
" ſums of money, or any part thereof, hath not yet paid
" to the ſaid *Thomas*, (although the ſaid *Elizabeth* by the
" ſaid *Thomas* afterwards, to wit, the twelfth day of *Octo-*
" *ber* in the fifth year aforeſaid, at the pariſh aforeſaid, in
" the county aforeſaid, and oftentimes afterwards, was re-
" quired ſo to do,) but hath hitherto altogether refuſed,
" and ſtill doth refuſe to pay him the ſame. Wherefore
" the ſaid *Thomas* ſaith that he is injured, and hath da-
" mage to the value of ſixty pounds: And therefore he
" brings this ſuit, *&c.*

Miſnomer plead- " And the Lady *Honor Gerrard*, againſt whom the
ed in abatement. " aforeſaid *Thomas* exhibited his bill by the name of the
" Lady *Elizabeth Gerrard*, otherwiſe *Garret*, in her pro-
" per perſon comes and defends the force and injury, *&c.*,
" and prays judgment of the ſaid bill, becauſe ſhe ſaith
[713] " that ſhe was baptized by the name of *Honor*, to wit, at
" the pariſh of *St. Clement Danes* aforeſaid, and by the
" ſame name hath been always from her baptiſm to this
Traverſe. " time known and called; without that, ſhe the ſaid *Ho-*
" *nor* now is, or ever was known or called by the name of
" *Elizabeth*, as by the bill aforeſaid is above ſuppoſed:
" And this ſhe is prepared to verify: Wherefore ſhe prays
" judgment of the aforeſaid bill, and that the ſaid bill may
" be quaſhed.

" And the ſaid *Thomas Stroud* prays a day to imparle to
" the plea aforeſaid; and it is granted to him, *&c.* And
Repl. " hereupon a day is given to the ſaid parties before our
" lady the queen at *Weſtminſter*, until *Thurſday* next after
Imparlances for " eight days from the day of *St. Hilary*, that is to ſay, for
the plaintiff. " the aforeſaid *Thomas* to imparle to the aforeſaid plea, and
" then to reply, *&c.* At which day before our lady the
" queen at *Weſtminſter* came as well the ſaid *Thomas Stroud*
" by his attorney aforeſaid, as the ſaid defendant in her
" proper perſon; and the ſaid *Thomas* prays a further day

" to

" to imparle to the aforeſaid plea; and it is granted to
" him, *&c.*; and upon this a further day is given to the
" ſaid parties before our lady the queen at *Weſtminſter*,
" until *Wedneſday* next after fifteen days from the day of
" *Eaſter*, that is to ſay, for the ſaid *Thomas* to imparle to
" the aforeſaid plea, and then to reply, *&c.* At which Replication by way of eſtoppel, that the defendant put in bail by the name of Eliz.
" day, before the lady the queen at *Weſtminſter*, cometh
" as well the ſaid *Thomas Stroud* by his attorney aforeſaid,
" as the aforeſaid defendant in her proper perſon: And
" the ſaid *Thomas* ſaith, that the ſaid Lady *Gerrard*, other-
" wiſe *Garret*, the perſon againſt whom the ſaid *Thomas*
" exhibited the ſaid bill by the name of Lady *Elizabeth*
" *Gerrard*, otherwiſe *Garret*, to his aforeſaid plea ought
" not to be admitted to quaſh the ſaid bill of the ſaid *Tho-*
" *mas*, becauſe he ſaith that ſhe the ſaid Lady *Gerrard*,
" otherwiſe *Garret*, the perſon againſt whom the ſaid
" *Thomas*, in the term of *St. Michael* laſt paſt, exhibited
" his ſaid bill by the name of the Lady *Elizabeth Gerrard*,
" otherwiſe *Garret*, in this ſaid term of *St. Michael*, put
" in common bail in court here, at the ſuit of the ſaid
" *Thomas*, in the plea aforeſaid, by the name of Lady *Eli-*
" *zabeth Garret*, as by the record thereof remaining in the
" ſame court of our ſaid lady the queen before the queen
" herſelf at *Weſtminſter* more fully appeareth: And this
" he is prepared to verify by the ſaid record: Wherefore
" he prayeth judgment if the ſaid Lady *Gerrard*, otherwiſe
" *Garret*, the perſon againſt whom the ſame *Thomas* ex-
" hibited his ſaid bill by the name of Lady *Elizabeth Ger-*
" *rard*, otherwiſe *Garret*, ought to be admitted to her ſaid
" plea to the quaſhing of his ſaid bill againſt the ſaid re-
" cord, *&c.*

" And the aforeſaid *Honor Gerrard*, againſt whom the Demurrer.
" aforeſaid *Thomas* exhibited his bill aforeſaid by the name
" of Lady *Elizabeth Gerrard*, otherwiſe *Garret*, ſaith, that
" the aforeſaid plea by the ſaid *Thomas* in manner and
" form aforeſaid above in his replication pleaded, and the [714]
" matter in the ſame contained, are not ſufficient in law
" to compel her the ſaid *Honor* to anſwer the ſaid bill of
" him the ſaid *Thomas*: To which ſaid plea ſhe the ſame
" *Honor* need not, nor is by the law of the land obliged in
" any manner to anſwer: And this ſhe is ready to verify:
" Wherefore for default of a ſufficient replication in this
" behalf, ſhe the ſaid *Honor*, as before, prays judgment of
" the ſaid bill, and that the ſame bill may be quaſhed, *&c.*
" And the ſaid *Thomas* ſaith, that the ſaid plea by the ſaid Joinder.
" *Thomas* in manner and form aforeſaid above in his re-
" plication pleaded, and the matter therein contained, are
" good and ſufficient in law to compel the ſaid *Elizabeth*
" to anſwer to the aforeſaid bill of the ſaid *Thomas* there-

" upon

" upon againſt the ſaid *Elizabeth*: Which ſaid plea, and " the matter in the ſame contained, the ſaid *Thomas* is " prepared to verify and prove, as the Court, *&c.* And " becauſe the ſaid *Elizabeth* hath not anſwered, nor hath " hitherto in anywiſe contradicted it, he the ſame *Thomas*, " as before, prayeth judgment, and that the ſaid *Elizabeth* " be compelled to anſwer to the aforeſaid bill of the ſaid " *Thomas*, *&c.* But becauſe the Court of our ſaid lady " the queen now here are not adviſed of giving their judg- " ment of and concerning the premiſes, day therefore is " given to the aforeſaid parties before our lady the queen " at *Weſtminſter*, until .... day next after ..... of " hearing their judgment of and concerning the ſaid pre- " miſes; for that the Court of our ſaid lady the queen " now here is not yet thereof, *&c.*"

Pleas before our Lord the King at Weſtminſter, *of the Term of the* Holy Trinity *in the Tenth Year of the Reign of our Lord* William *the Third, now King of* England, *&c. Roll* 763.

Johnſon *againſt* Long.

[3 Ld. Raym. Entries 389. S. C.]

Salk. 10. Carth. 455. S. C.

Somerſet, " BE it remembered, That heretofore, to wit, to wit. " in the term of *St. Michael* laſt paſt, be- " fore the lord the king at *Weſtminſter*, came *Timothy* " *Johnſon* by *Philip Hodges* his attorney, and brought into

Declaration for a nuſance.

" the court of our ſaid lord the king then there, his cer- " tain bill againſt *John Long*, in the cuſtody of the mar- " ſhal, *&c.*, of a plea of treſpaſs upon the caſe, and there " are pledges of proſecuting, to wit, *John Doe* and *Rich-*

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" *ard Roe*, which ſaid bill followeth in theſe words, to wit, " *Somerſet*, to wit, *Timothy Johnſon* complains of *John* " *Long*, in the cuſtody of the marſhal of the Marſhalſea " of the lord the king that now is, before the king himſelf " being, for that, to wit, That whereas the ſaid *Timothy*, " on the twenty-firſt day of *April* in the eighth year of the " reign of our Lord *William* the Third now King of *Eng-* " *land*, *&c.*, and ever after to this time, was poſſeſſed and " ſtill is poſſeſſed of a certain ancient work-houſe, ſituate " and being in the pariſh of *Whatley* in the county afore- " ſaid, in which work-houſe on the ſame twenty-firſt day " of

" of *April* in the eighth year aforeſaid, and from time
" whereof the memory of man is not to the contrary,
" there was a certain ancient window in the weſt part of
" the ſame work-houſe, through which a very wholeſome
" air and a chearing light entered and came in, and uſed
" and was accuſtomed to enter and come in on the ſame
" twenty-firſt day of *April* in the eighth year aforeſaid,
" and for all the time aforeſaid, to the great benefit and
" advantage of the occupiers of the ſaid work-houſe: And
" whereas the ſaid *John* on the firſt day of *April* in the
" eighth year aforeſaid, and always afterwards to this
" time, had been poſſeſſed, and doth ſtill remain poſſeſſed
" of a certain parcel of land, with the appurtenances, ſi-
" tuate, lying, and being in the pariſh of *Whatley* afore-
" ſaid in the county aforeſaid, lying contiguous to the
" aforeſaid work-houſe, and being ſo poſſeſſed thereof, the
" ſaid *John* contriving and fraudulently intending many
" ways to burthen and oppreſs the ſaid *Timothy*, and al-
" together to deprive him the ſaid *Timothy* of the air and
" light which into the work-houſe aforeſaid through the
" window aforeſaid uſed and was accuſtomed to enter and
" come in, and to ſtop up the aforeſaid work-houſe with
" horrid darkneſs, and altogether to deprive the ſaid *Ti-*
" *mothy* of the uſe and advantage of the ſaid work-houſe,
" on the firſt day of *April* in the eighth year aforeſaid, at
" *Whatley* aforeſaid, in the county aforeſaid, erected and
" built anew a certain wall upon the ſaid parcel of land of
" the ſaid *John*, ſo near the ſaid work-houſe, that by the
" ſame erection of the wall aforeſaid, the ſaid window on
" the ſaid twenty-firſt day of *April*, and always after, to
" the day of exhibiting this bill, to wit, the twenty-third
" day of *October* in the ninth year of the reign of our ſaid
" lord the now king, was very much ſtopped up and dark-
" ened, whereby the ſame *Timothy* totally loſt and was de-
" prived of the whole advantage and eaſement of the ſaid
" window, and the comfort and wholeſomneſs of the air
" and light which uſed to enter and come in and upon
" the ſaid window as aforeſaid, and the whole uſe and
" profit of the ſaid work-houſe from the ſaid twenty-firſt
" day of *April* in the eighth year aforeſaid, to the afore-
" ſaid twenty-third day of *October* in the ninth year afore-
" ſaid: Wherefore the ſaid *Thomas* ſaith, that he is preju-
" diced and damnified to the value of forty pounds: And
" thereupon he brings this ſuit, *&c.*

Poſſeſſion alleged in an old work-houſe, wherein was a window time out of mind.

Defendant's poſſeſſion in a piece of land adjoining thereto.

Defendant obſtructed the light, whereby the plaintiff loſt the benefit of his ſhop.

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" And now at this day, to wit, *Friday* next after the
" morrow of the *Holy Trinity* in this ſame term, until
" which day the ſaid *John Long* had leave to imparle to
" the ſaid bill, and then to anſwer, *&c.* before our lord
" the king at *Weſtminſter* comes as well the ſaid *Timothy*
" by his attorney aforeſaid, as the ſaid *John* by *Jacob Long*

Imparlance.

" his attorney, and the ſaid *John* defends the force and
" injury, when, &c. And ſaith that the ſaid *Timothy*
" ought not to have or maintain his ſaid action thereupon
" againſt him, becauſe he ſaith that the aforeſaid *Timothy*
" heretofore, to wit, in *Eaſter* term in the eighth year of
" the reign of our ſaid lord the king, that now is, in the
Pleads another action and recovery for the ſame nuiſance in bar.
" court of the ſaid lord the king, before the king himſelf
" here, to wit, at *Weſtminſter*, in the county of *Middleſex*,
" impleaded the ſame *John Long* in a certain plea of treſ-
" paſs upon the caſe, declaring againſt him, That whereas
Setting forth a former declaration.
" the ſame *Timothy* on the tenth day of *October* in the ſe-
" venth year of the reign of our lord the king that now
" is, and always afterwards until that time, had been,
" and then was poſſeſſed of a certain ancient work-houſe,
" ſituate and being in the pariſh of *Whatley* in the county
" aforeſaid, and that in that work-houſe on the ſame
" tenth day of *October* in the ſeventh year aboveſaid,
" and from time whereof the memory of man was not
" then to the contrary, there was a certain ancient win-
" dow in the weſt part of the ſaid work-houſe, and that
" through the ſame window the moſt wholeſome air and
" light entered and came in on the ſame tenth day of *Oc-*
" *tober* in the ſeventh year aforeſaid, and for the whole
" time aboveſaid entered and came in, and was uſed and
" accuſtomed to enter and come in, to the great bene-
" fit and advantage of the occupiers of the ſaid work-
" houſe; and that the ſaid *John* on the ſaid tenth day of
" *October* in the ſeventh year aforeſaid, and always after-
" wards until that time, had been poſſeſſed, and then was
" poſſeſſed of a certain parcel of land with the appurte-
" nances, ſituate, lying, and being in the pariſh of *What-*
" *ley* in the county aforeſaid, lying contiguouſly to the
" aforeſaid work-houſe; and being ſo poſſeſſed thereof, the
" ſaid *John* contriving and fraudulently intending many
" ways to burden and oppreſs the ſaid *Timothy*, and alto-
" gether deprive him the ſaid *Timothy* of the air and light
" which uſed and was accuſtomed to come and enter into
" the ſaid work-houſe through the window aforeſaid, and
" to ſtop up the work-houſe aforeſaid with terrible dark-
" neſs, and wholly to deprive the ſaid *Timothy* of the uſe
" and advantage of the ſaid work-houſe, on the ſaid tenth
" day of *October* in the ſeventh year aforeſaid, at *Whatley*
" aforeſaid in the county aforeſaid, did newly erect and
" build a certain wall upon the ſaid parcel of land of
" him the ſaid *John*, ſo near the ſaid work-houſe that by
" the ſame erection of the wall aforeſaid, the aforeſaid
" window, on the ſaid tenth day of *October*, and always
" afterwards until the twentieth day of *April* in the eighth
[717] " year of the reign of the now king, was very much
" ſtopped up and darkened, whereby the ſaid *Timothy* to-

" tally

" tally loſt and was deprived of the whole advantage and " eaſement of the ſaid window, and the comfort and " wholeſomeneſs of the air and light, which in and " through the ſaid window aforeſaid was accuſtomed to " enter and come in, and the whole uſe and profit of the " ſaid work-houſe from the ſaid tenth day of *October* in " the ſeventh year aforeſaid, unto the ſaid twentieth day " of *April* in the eighth year aforeſaid: Wherefore the ſaid " *Timothy* then ſaid that he was injured, and had received " damage to the value of forty pounds. And there- " upon he then brought his ſuit, *&c.* And there were " ſuch proceedings thereupon in the ſame court here, to " wit, at *Weſtminſter* aforeſaid, after that the ſaid *John* had " there pleaded thereunto, that he was not thereof guilty, " and by a certain jury of the country had been thereof " found guilty, That afterwards, to wit, in the term of " St. *Michael* then next following, by the ſame court " here, it was conſidered, that the ſaid *Timothy* ſhould re- " cover againſt the ſaid *John* fourteen pounds for his da- " mages which he had ſuſtained as well by occaſion of " the premiſes in the ſame record mentioned, as for his " coſts and damages by him about his ſuit in that behalf " laid out, as by the record thereof remaining in the ſame " court here, to wit, at *Weſtminſter* aforeſaid, more fully " appears. And the ſame *John* further ſaith, that the " aforeſaid work-houſe, window, erection, and building " of the wall aforeſaid, in the ſaid recited record men- " tioned, and the aforeſaid work-houſe, window, erection, " and building of the wall aforeſaid, in the bill of the ſaid " *Timothy* againſt him the ſaid *John Long* now exhibited and " abovementioned and expreſſed, are the ſame work-houſe, " window, erection, and building of the wall, and not other " nor different; and that the aforeſaid *Timothy* in the above- " recited record named plaintiff, and the aforeſaid *Timothy* " above in the ſaid bill named plaintiff, are one and the " ſame perſon, and not another nor different; and that " the aforeſaid *John* in the ſaid recited record named de- " fendant, and the aforeſaid *John* in the ſaid bill above " named defendant, are one and the ſame perſon, and not " another nor different: And this he is ready to verify. " Whereupon he prays judgment if the aforeſaid *Timo-* " *thy* ought to have or maintain his ſaid action againſt " him, *&c.*

Judgment in the former proceedings.

Averment of the identity.

" And the ſaid *Timothy* ſaith, that he, notwithſtanding " any matter by the ſaid *John* above in pleading alleged, " ought not to be precluded from having his ſaid action " thereupon againſt him the ſaid *John*; becauſe he ſaith, " that the plea aforeſaid by the ſaid *John* in manner and " form aforeſaid above pleaded, and the matter therein

Demurrer.

" contained, are not ſufficient in the law to preclude the
" ſame *Timothy* from having his ſaid action thereupon
" againſt the ſaid *John*; to which ſaid plea he the ſame
" *Timothy* hath no neceſſity, neither by the law of the
[718] " land is bound in any manner to anſwer: And this he is
" ready to verify. Whereupon for default of a ſufficient
" anſwer in this behalf, the ſame *Timothy* prays judgment,
" and his damages by occaſion of the premiſes aforeſaid
" to be to him adjudged, *&c.*

Joinder. " And the aforeſaid *John* ſaith, that the ſaid plea by
" him the ſaid *John*, in manner and form aforeſaid above
" pleaded, and the matter in the ſame contained, are good
" and ſufficient in the law to preclude the ſaid *Timothy*
" from having his ſaid action thereupon againſt him the
" ſaid *John*, which ſaid plea, and the matter in the ſame
" contained, he the ſame *John* is ready to verify and
" prove as the Court, *&c.* And becauſe the ſaid *Timo-*
" *thy* hath not anſwered to the ſaid plea, nor hitherto any
" ways contradicted it, he the ſaid *John*, as before, prays
" judgment, and that the ſaid *Timothy* be debarred of hav-
Continuance. " ing his ſaid action againſt him the ſaid *John*. But be-
" cauſe the Court of the ſaid lord the king now here are
" not yet adviſed of giving their judgment in and con-
" cerning the premiſes, a day is thereupon given to the
" parties aforeſaid, before the ſaid lord the king at *Weſt-*
" *minſter*, until *Wedneſday* next after eight days from the
" day of St. *Martin*, of hearing their judgment therein,
" for that the Court of the ſaid lord the king now here is
" not yet thereupon, *&c.* At which day, before the lord
" the king at *Weſtminſter*, come the ſaid parties by their
Judgment for the defendant. " ſaid attornies; upon which all and ſingular the premiſes
" being ſeen, and by the Court of the lord the king now
" here more fully underſtood, and mature deliberation
" thereupon had, it ſeems to the Court of the lord the
" king here, that the plea aforeſaid by ſaid *John*, in man-
" ner and form aforeſaid above pleaded, and the matter
" in the ſame contained, are good and ſufficient in law to
" debar the ſaid *Timothy* from having his ſaid action
" againſt the ſaid *John*. Therefore it is conſidered, that
" the ſaid *Timothy* take nothing by his ſaid bill, but that
" he for his falſe complaint be thereupon in mercy, *&c.*,
" and that the ſaid *John* go then without a day, *&c.*
" And it is further conſidered, that the aforeſaid *John* re-
" cover againſt the ſaid *Timothy* ſix pounds and ten ſhil-
" lings for his coſts and charges in and about his defence
" in this behalf ſuſtained, adjudged by the Court of the
" ſaid lord the king now here, to the ſaid *John*, by his aſ-
" ſent, according to the form of the ſtatute in ſuch caſe
" made and provided; and that the aforeſaid *John* have
" execution thereof," *&c.*

Pleas before our Lord the King and our Lady the Queen at Weſtminſter, *of the Term of* Eaſter *in the Second Year of the Reign of our Lord* William *and our Lady* Mary, *now King and Queen of* England. *Roll* 43.

Payne *againſt* Partridge and another.

[3 Ld. Raym. Entries 439. S. C.]

Cambridgeſhire, to wit, " BE it remembered, That heretofore, to wit, " B to wit, in the term of St. *Michael* " laſt paſt, before our lord the king and our lady the " queen at *Weſtminſter*, came *Iſaac Payne*, by *Humphry* " *Ambler* his attorney, and brought into the court of our " ſaid lord the king and lady the queen, then there, his " certain bill againſt *Edward Partridge*, Eſq. and *William* " *Boulter*, in the cuſtody of the marſhal, *&c.*, of a plea of " treſpaſs upon the caſe; and there are pledges of proſe- " cuting, to wit, *John Doe* and *Richard Roe*, which ſaid " bill followeth in theſe words, that is to ſay, *Cambridge-* " *ſhire*, to wit, *Iſaac Payne* complains of *Edward Par-* " *tridge*, Eſq. and *William Boulter*, in the cuſtody of the " marſhal of the *Marſhalſea* of our lord the king and lady " the queen, before the ſaid king and queen being, for " that, to wit, that whereas the village of *Littleport* with- " in the iſle of *Ely* in the county aforeſaid, is, and from " all the time whereof the memory of man is not to the " contrary, was an ancient village, and whereas within " the ſaid village of *Littleport* aforeſaid there is, and for " all the ſaid time was, an ancient river called *Wilney* ri- " ver, and upon the ſame river, and acroſs the ſame from " the whole time aboveſaid, there was an ancient paſſage " [or ferry] at the north-eaſt ſide of the ſame village of " *Littleport*, near the end of a lane called *Ferry-lane*, " leading from the village of *Littleport* aforeſaid to the " ſaid river, for the paſſing and carrying over of the ſub- " jects of this realm of *England*, deſiring to paſs over and " beyond the ſaid river, to wit, from a certain place called " the *Ferry-lane*, from the north-eaſt part thereof to a " certain place called *Adventurous Bank* from the north- " eaſt part of the ſame river overthwart that river, either " forward or backward, at their will, for the paſſing over " and tranſporting of their horſes, mares, and geldings, " which ſaid paſſing over and tranſporting from the whole " time aboveſaid until of late, to wit, the firſt day of *May* " in

3 Mod. 289. 1 Show. 243, 255. Salk. 12. Comb. 180. Carth. 191. Holt 6. S. C.

Declaration by an inhabitant of Littleport againſt the proprietors of a ferry-boat for not keeping it in repair.

Preſcription in a ferry and toll for paſſage.

" in the fifteenth year of our lord *Charles* the Second, late
" King of *England*, *&c.*, were had and performed in a
" ferry-boat there kept by the proprietors and occupiers
" of the ſaid paſſage [or ferry]; and the proprietors, oc-
[720] " cupiers, and keepers of the ſaid paſſage [or ferry] and
" ferry-boat for the time being, for the better keeping and
" maintaining the ſame, from the whole time aforeſaid,
" took, and were accuſtomed to take, of the ſaid ſubjects
" of this realm of *England*, ſo to be paſſed and tranſported
" over and beyond the ſaid river, to wit, from the afore-
" ſaid place called the *Ferry-lane* to the aforeſaid place
Exception of inhabitants in ancient meſſuages from paying toll. " called *Adventurous Bank*, acroſs the ſaid river, (other
" than of the inhabitants of the ſame village of *Littleport*,
" reſiding in ancient meſſuages or ancient cottages there,)
" certain reaſonable rates, as toll or cuſtom, to wit, one
The ſeveral tolls taken. " halfpenny for every horſe and man thereupon riding, and
" for every led horſe, mare, or gelding, one farthing; and
" for every horſe, mare, or gelding, otherwiſe loaded, one
" penny for ſuch paſſing and tranſporting of them as
" aforeſaid, to be received every time of their paſſing over
" beyond the river aforeſaid, at the paſſage [or ferry]
Preſcription of exemption for the inhabitants in the ancient meſſuages and cottages for free paſſage. " aforeſaid, either forward or backward: And whereas
" alſo within the ſame village of *Littleport* there is, and
" from the whole time aforeſaid, whereof the memory of
" man is not to the contrary, there was ſuch an ancient
" cuſtom, to wit, that the inhabitants of that village in
" ancient meſſuages or ancient cottages there reſiding, had
" and might have, and from the whole time aforeſaid were
" accuſtomed to have, liberty of paſſing over the ſaid ri-
" ver at the aforeſaid paſſage there, for themſelves, their
" horſes, mares, and geldings in the ferry-boat aforeſaid,
" ſo as aforeſaid to be tranſported either forward or back-
" ward, at their pleaſure, without any payment whatſo-
" ever for ſuch their paſſing over ſo to be had: And
That the plaintiff is an inhabitant in an ancient meſſuage. " whereas alſo the ſaid *Iſaac*, on the firſt day of *May* in
" the ſecond year of the reign of our lord *James* the Se-
" cond, late king of *England*, and long before and from
" thence afterwards to this time was, and ſtill remains
" one of the inhabitants of the aforeſaid village of *Little-*
" *port*, and then and ſtill reſiding in a certain ancient
" meſſuage there, and for that cauſe and reaſon he the
" ſaid *Iſaac*, by virtue of the ſaid cuſtom, had and hath a
" right, and ought to have the liberty of paſſing over the
" ſaid river at the paſſage aforeſaid, in the ferry-boat
" aforeſaid, for himſelf, his horſes, mares, and geldings in
" form aforeſaid, without any payment whatſoever for
Breach in not keeping the boat. " the ſame to be made. Nevertheleſs the ſaid *Edward*
" and *William* not being ignorant of the ſaid cuſtom, but
" contriving and maliciouſly intending him the ſaid *Iſaac*
" illegally

" illegally to burden and greatly to damnify, and to de-
" prive him of the liberty of his aforeſaid paſſing over
" the ſaid river to be had at the paſſage aforeſaid in the
" ſaid ferry-boat as aforeſaid, and alſo to cauſe him the
" ſaid *Iſaac* entirely to loſe the ſame, on the ſaid firſt
" day of *May* in the ſecond year aboveſaid, and from
" thence to the day of exhibiting the ſaid bill of the ſaid
" *Iſaac* (the ſame *Edward* and *William*, then and before
" and afterwards to this time being proprietors, occu-
" piers, and keepers of the paſſage [or ferry] and ferry-
" boat aforeſaid) had or preſerved, or kept no ferry-boat
" at the ſaid paſſage [or ferry] for the paſſing over of the [721]
" ſubjects of this realm, and their horſes, mares, and
" geldings aforeſaid, willing to paſs over and beyond the
" ſaid river, but have for the time aforeſaid totally omit-
" ted and neglected to do, have, preſerve, or keep the
" ſame, and no ferry-boat for the time aforeſaid, or any
" part of that time, was or yet is, although the ſaid *Ed-*
" *ward* and *William*, on the ſaid firſt day of *May* in the
" ſecond year aboveſaid, and often afterwards, at *Little-*
" *port* aforeſaid, were requeſted by the ſaid *Iſaac* to have
" ſuch ferry-boat at the paſſage aforeſaid, and to permit
" him the ſaid *Iſaac* to enjoy his ſaid liberty there; ſo
" that the ſaid *Iſaac* from the aforeſaid firſt day of *May*
" in the ſecond year aboveſaid, and from thence to this
" time was, and yet is hindered and wholly deprived of
" his liberty of paſſing over the river aforeſaid at the ſaid
" paſſage in form aforeſaid, according to the cuſtom
" aforeſaid to be had, contrary to the ſaid cuſtom, and
" to the damage of him the ſaid *Iſaac* of five hundred
" pounds. And thereupon he brings this ſuit, *&c.*

" And now at this day, to wit, *Wedneſday* next after fif- Imparlance.
" teen days from the day of *Eaſter* in this ſame term, to
" which day the ſaid *Edward* and *William* had leave to
" imparl to the ſaid bill and then to anſwer, *&c.* before
" the lord the king and lady the queen at *Weſtminſter*,
" cometh as well the ſaid *Iſaac* by his ſaid attorney, as the
" ſaid *Edward* and *William* by *Joſeph Sherwood* their at-
" torney; and the ſaid *Edward* and *William* defend the
" force and injury, when, *&c.*, and ſay that the aforeſaid
" *Iſaac* ought not to have or maintain his action afore-
" ſaid thereupon againſt them; becauſe proteſting that Proteſtation that the paſſage was not in a boat.
" the paſſing and carrying of perſons, horſes, mares, and
" geldings, over and acroſs the ſaid river, were not had
" or done in any ferry-boat kept for the paſſing over and
" tranſportation of perſons or cattle in the place where,
" and in manner and form as by the declaration aforeſaid
" is above ſuppoſed: and proteſting that within the ſaid Further proteſtation that there is no ſuch cuſtom;
" village of *Littleport* there is not, nor ever was any ſuch

" cuſtom as in the declaration aforeſaid is above ſuppoſed
proteſtation alſo, that the plaintiff was not an inhabitant in any old meſſuage.
" and alleged; and proteſting alſo that the aforeſaid *Iſaac*
" is not, nor ever was one of the inhabitants of the ſaid
" village of *Littleport*, reſiding in any ancient meſſuage
" there in manner and form as by the aforeſaid declara-
" tion is above ſuppoſed, the ſaid *Edward* and *William*
" for plea ſay, that long before the ſaid time in which,
Plea that at their own charge they built a bridge inſtead of a boat, and keep it in repair, more ſafe for paſſage than the boat.
" *&c.* to wit, on the firſt day of *May* in the fifteenth year
" of the reign of the ſaid late king *Charles* the Second
" aforeſaid, he the ſaid *Edward*, at his own proper coſts
" and charges, erected, built, and placed, in and upon the
" ſaid river and overthwart the ſame river at the paſſage
" aforeſaid, a certain bridge made of wood and ſtones for
" the uſe, eaſement of paſſing over, and tranſporting of
" all and ſingular the perſons, horſes, mares, and geldings
" there coming and willing to paſs over and beyond the
" ſaid river at the paſſage aforeſaid, which ſaid bridge
" there ſo erected and placed the ſame *Edward* there
" from time to time, and at all times after the making
[722] " thereof to this time, hath well and ſufficiently had, pre-
" ſerved, and maintained, repaired and kept, and ſtill
" hath, preſerveth, maintaineth, and keepeth there, ſo that
" the ſaid *Iſaac* and all and ſingular the perſons, horſes,
" mares, and geldings there coming and willing to paſs
" over and beyond the ſaid river at the paſſage aforeſaid,
" from time to time and at all times after the making
" and placing of the aforeſaid bridge there unto this time,
" might and ſtill may there go, return, and paſs upon, by
" and over the ſaid bridge acroſs and beyond the river
" aforeſaid, at the paſſage aforeſaid, without any danger,
" and more ſafely, better and ſooner, than in a ferry-
For which reaſon they omitted to keep the boat.
" boat: For which reaſon the ſaid *Edward* and *William*
" had preſerved or kept no ferry-boat at the ſaid paſſage,
" but have omitted and neglected to do, have, preſerve,
" or keep the ſame, as they well might, for the cauſe
" aforeſaid: And this they are prepared to verify. Where-
" fore they pray judgment if the ſaid *Iſaac* ought to have
" or maintain his action aforeſaid thereupon againſt
" them, *&c.*

Reply, that he was not permitted to paſs over any bridge.
" And the ſaid *Iſaac* ſaith, that he, notwithſtanding
" any thing by the ſaid *Edward* and *William* above al-
" leged, ought not to be precluded from having his ſaid
" action thereupon againſt them, becauſe he ſaith, that he
" the ſaid *Iſaac* was not permitted to have the liberty of
" the paſſage aforeſaid, by any bridge over and beyond
" the river aforeſaid, according to the cuſtom in the de-
" claration before-mentioned, againſt the cuſtom afore-
" ſaid: And this he is ready to verify. Wherefore he
" prays judgment and his damages by occaſion of the
" premiſes to him to be adjudged, *&c.*

" And

" And the ſaid *Edward* and *William* ſay, That the ſaid Demurrer.
" plea by the ſaid *Iſaac* in manner aforeſaid above in his
" replication pleaded, and the matter in the ſame con-
" tained, are not ſufficient in the law to have and main-
" tain the aforeſaid action of him the ſaid *Iſaac* againſt
" them the ſaid *Edward* and *William*, to which the ſaid
" *Edward* and *William* need not, nor are by the law of
" the land in any manner bound to anſwer: And this
" they are ready to verify. Wherefore, for default of a
" ſufficient replication in this behalf, the ſame *Edward*
" and *William* as before pray judgment, and that the
" ſaid *Iſaac* be precluded from having his ſaid action
" againſt them the ſaid *Edward* and *William*, *&c.*

" And the ſaid *Iſaac* ſaith, That the aforeſaid plea by Joinder.
" the ſame *Iſaac* in manner and form aforeſaid above in
" his replication pleaded, and the matter in the ſame
" contained, are good and ſufficient in the law to have
" and maintain the action of the ſaid *Iſaac* againſt them
" the ſaid *Edward* and *William*; which ſaid plea and the
" matter therein contained the ſame *Iſaac* is ready to
" verify and prove, as the Court, *&c.* And becauſe the
" aforeſaid *Edward* and *William* have not anſwered the
" ſaid plea, nor have hitherto any ways denied the ſame,
" he the ſaid *Iſaac*, as before, prays judgment and his da-
" mages by occaſion of the premiſes to be adjudged to
" him, *&c.*

" But becauſe the Court of the ſaid lord the king and [723]
" lady the queen now here are not yet adviſed of giving Continuance.
" their judgment of and concerning the premiſes, a day
" therefore is given to the ſaid parties before the lord the
" king and the lady the queen, at *Weſtminſter*, until *Fri-*
" *day* next after the morrow of the *Holy Trinity*, of hear-
" ing their judgment of and concerning the ſaid pre-
" miſes; for that the Court of the ſaid lord the king and
" lady the queen now here thereof, are not yet, *&c.* At
" which day, before the lord the king and lady the queen
" at *Weſtminſter*, come the ſaid parties by their ſaid at-
" tornies. But becauſe the Court of our lord the king
" and lady the queen are not yet adviſed of giving their
" judgment of and concerning the premiſes, a day there-
" fore is given to the ſaid parties before our lord the king
" and lady the queen at *Weſtminſter*, until *Thurſday* next
" after three weeks from the day of St. *Michael*, of hear-
" ing their judgment thereupon, for that the Court of
" our ſaid lord and lady the now king and queen are not
" yet thereof, *&c.* At which day, before the lord the
" king and lady the queen at *Weſtminſter*, come the par-
" ties aforeſaid by their ſaid attornies. But becauſe the
" Court of the ſaid lord the king and lady the queen now
" here

" here are not yet adviſed of giving their judgment of " and concerning the premiſes, a day therefore is given " to the ſaid parties before our lord the king and lady the " queen at *Weſtminſter*, until *Friday* next after eight days " from the day of St. *Hilary*, of hearing their judgment, " for that the Court of the ſaid lord the king and lady " the queen now here are not yet thereupon, *&c.* At " which day, before the lord the king and lady the queen " at *Weſtminſter*, come the aforeſaid parties by their ſaid " attornies: But becauſe the Court of the ſaid lord the " king and lady the queen, now here, are not yet adviſed " of giving their judgment of and concerning the pre- " miſes, a day therefore is given to the ſaid parties " before the lord the king and lady the queen at *Weſt-* " *minſter*, until *Wedneſday* next after fifteen days from " the day of *Eaſter*, of hearing their judgment there- " upon, for that the Court of the ſaid lord the king and " lady the queen now here are not yet thereupon, *&c.* " At which day, before the lord the king and lady the " queen at *Weſtminſter*, come the aforeſaid parties by " their ſaid attornies: But becauſe the Court of the ſaid " lord the king and lady the queen now here are not yet " adviſed of giving their judgment of and concerning the " premiſes, a day therefore is given to the ſaid parties " before the lord the king and lady the queen at *Weſt-* " *minſter*, until *Saturday* next after eight days from the " day of the *Holy Trinity*, of hearing their judgment " thereupon, for that the Court of the ſaid lord the king " and lady the queen now here are not yet thereupon, " *&c.* At which day, before the lord the king and lady " the queen at *Weſtminſter*, come the ſaid parties by their " attornies aforeſaid; upon which all and ſingular the " premiſes being ſeen and more fully underſtood by the
Judgment for defendant. " Court of the ſaid lord the king and lady the queen
[724] " now here, and mature deliberation being thereupon " had, it ſeems to the Court of the ſaid lord the king and " lady the queen now here, that the aforeſaid plea by " the aforeſaid *Iſaac*, in manner and form aforeſaid above " in his replication pleaded, and the matter in the ſame " contained, are not ſufficient in the law to have and " maintain the ſaid action of him the ſaid *Iſaac*, againſt " the ſaid *Edward* and *William*: Therefore it is conſi- " dered, that the ſaid *Iſaac* take nothing by his ſaid bill, " but that for his falſe complaint he be thereupon in " mercy, *&c.* and that the aforeſaid *Edward* and *William* " go hence without a day," *&c.*

Pleas before our Lord the King at Weſtminſter, *of the Term of* St. Hilary *in the Seventh Year of the Reign of our Lord* William *the Third, now King of* England, *&c. Roll* 697.

Hicks *againſt* Dowling.

[3 Ld. Raym. Entries 354. S. C.]

Somerſet, " BE it remembered, That heretofore, to wit, to wit, " in the term of St. *Michael* laſt paſt, before " our lord the king at *Weſtminſter*, came *Sarah Hicks* wi- " dow, by *Thomas Callow* her attorney, and brought into " the court of our ſaid lord the king then and there, his " certain bill againſt *John Dowling*, in the cuſtody of the " marſhal, *&c.*, of a plea of treſpaſs upon the caſe; and " there are pledges of proſecuting, to wit, *John Doe* and " *Richard Roe*; which ſaid bill followeth in theſe words, " that is to ſay, *Somerſet*, to wit, *Sarah Hicks* widow com- " plains of *John Dowling*, in the cuſtody of the marſhal " of the *Marſhalſea* of our lord the king, before the king " himſelf being, for that, to wit, That whereas the ſaid " *Sarah*, on the twenty-ſixth day of *January* in the year " of our Lord one thouſand ſix hundred and ninety-two, " was lawfully poſſeſſed of and in a certain meſſuage, ſi- " tuate, lying, and being in *Eaſt Dundry*, in the county " aforeſaid, for a certain term of years then and yet to " come and unexpired; and being ſo thereof poſſeſſed, " the ſame *Sarah* on the ſame day and year aboveſaid, at " *Eaſt Dundry* aforeſaid, demiſed the ſaid meſſuage " (among others) to the aforeſaid *John Dowling*, to have " and to hold to the ſame *John Dowling*, from the twenty- " fifth day of *March* then next following, for the term " of three years, if the ſaid *Sarah Hicks* and *John Dow-* " *ling*, and one *Thomas Dowling* and *Edith*, the father " and mother of him the ſaid *John Dowling*, ſhould ſo " long live; by virtue of which ſaid demiſe, the aforeſaid " *John Dowling* afterwards, to wit, on the twenty-ſixth " day of *March* in the year of our Lord one thouſand ſix " hundred and ninety-three, entered into the meſſuage " aforeſaid, and thereof (among others) was poſſeſſed for " the ſaid term of three years above to him demiſed, the " reverſion thereof belonging to the ſame *Sarah*, for the " reſidue of the ſaid term firſt above mentioned: And the " ſaid *Sarah* in fact ſaith, that as well the ſaid *Thomas* " *Dowling* and *Edith*, as the aforeſaid *John Dowling*, are " yet

Salk. 13. Caſes B. R. 100. S. C.

Declaration that ſhe was lawfully poſſeſſed of a meſſuage for a term of years, and demiſed it for three years to the defendant, if ſuch perſons ſhould ſo long live.

[725]

Defendant's entry and poſſeſſion for his term, the reverſion belonging to the plaintiff.

Averment of lives.

" yet in being and in full life, to wit, at *Eaſt Dundry*
Breach in negligent keeping his fire. " aforeſaid: Nevertheleſs the aforeſaid *John Dowling*,
" ſufficiently knowing the premiſes, but contriving and
" maliciouſly intending in this part very much to damnify
" and burthen the ſaid *Sarah*, he the ſaid *John Dowling*,
" on the twentieth day of *June* in the year of our Lord
" one thouſand ſix hundred and ninety-five, (being ſo as
" aforeſaid poſſeſſed of the meſſuage aboveſaid, and the
" reverſion thereof belonging to the ſaid *Sarah* in manner
" before ſaid,) did ſo negligently and improvidently keep
" his fire in the meſſuage aforeſaid, that by reaſon thereof
" the ſame meſſuage was then burnt and is totally de-
" ſtroyed: Whereupon the ſaid *Sarah* ſaith, that ſhe is in-
" jured, and hath damage to the value of five hundred
" pounds: And therefore ſhe brings this ſuit, *&c.*

Imparlance. " And now at this day, to wit, *Thurſday* next after eight
" days from the day of St. *Hilary* in this ſame term, until
" which day the ſaid *John* had leave to imparl to the ſaid
" bill, and then to anſwer, *&c.* before our lord the king
" at *Weſtminſter*, comes as well the ſaid *Sarah* by her at-
" torney aforeſaid, as the ſaid *John* by *Samuel Brewſter*
Not guilty. " his attorney: And the ſame *John Dowling* defends the
" force and injury, when, *&c.*, and ſaith that he is not
" thereof guilty; and of this he puts himſelf upon the
" country; and the aforeſaid *Sarah* doth likewiſe, *&c.*
" Therefore let a jury come thereupon before the lord the
" king at *Weſtminſter*, on *Wedneſday* next after eight days
" from the day of the purification of the bleſſed *Mary*,
" and who neither, *&c.* to recognize, *&c.* becauſe as well,
" *&c.* The ſame day is given to the ſaid parties there," *&c.*

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[726] *Pleas before our Lord the King at* Weſtminſter, *of the Term of the* Holy Trinity *in the Ninth Year of the Reign of our Lord* William *the Third, now King of* England, *&c. Roll* 359.

Turbervile *againſt* Stampe.

[3 Ld. Raym. Entries 375. S.C.]

Salk. 13, 647. Comb. 459. Carth. 425. Skin. 681. Caſes *Dorſet*, " BE it remembered, That heretofore, to wit,
to wit, " in the term of *Eaſter* laſt paſt, before our
" lord the king at *Weſtminſter*, came *Thomas Turbervile*
" the

" the younger, Eſq. by *Edward Lawrence* his attorney, B. R. 151. Holt 9. S. C.
" and brought into the Court of our ſaid lord the king
" then there, his certain bill againſt *John Stampe*, Gentle-
" man, in the cuſtody of the marſhal, &c., of a plea of
" treſpaſs upon the caſe; and there are pledges of proſe-
" cuting, to wit, *John Doe* and *Richard Roe*; which ſaid
" bill followeth in theſe words, that is to ſay, *Dorſet*, to
" wit, *Thomas Turbervile* the younger, Eſq. complains of
" *John Stampe*, Gent. in the cuſtody of the marſhal of the
" *Marſhalſea* of our lord the king, before the king him-
" ſelf being; for that, to wit, That whereas, according to Declaration upon the cuſtom of the realm, for negligently keeping a fire in the defendant's cloſe, whereby the plaintiff's heath and furzes were burnt.
" the law and cuſtom of this realm of *England* hitherto
" uſed and approved, every man of the ſame realm is
" obliged to keep his fire ſafe and ſecure by day and by
" night, leſt for want of the due keeping of ſuch fire any
" damage in any manner happen to any perſon of the
" ſame realm; and whereas the aforeſaid *Thomas*, on the
" ſixth day of *April* in the ninth year of the reign of our
" lord *William* the Third, now King of *England*, &c.,
" was poſſeſſed of a certain cloſe of heath lying and being
" in the pariſh of *Stoke* in the county aforeſaid: And
" whereas alſo the ſaid *John*, on the day and year above-
" ſaid, was in like manner poſſeſſed of a certain other cloſe
" of heath, next adjoining to the ſaid cloſe of heath of
" him the ſaid *Thomas*, in the pariſh and county aforeſaid,
" the ſaid *John*, on the day, year, and place aboveſaid, ſo
" negligently and improvidently kept his fire in the ſaid
" cloſe of heath of him the ſaid *John*, that for default of
" the due keeping of the ſaid fire, the heath and furzes
" of the ſaid *Thomas*, to the value of forty pounds, in the
" ſaid cloſe of heath of him the ſaid *Thomas* then growing
" and being, were burnt, to the great damage of the ſaid
" *Thomas*, and contrary to the cuſtom aforeſaid: Where-
" fore he ſaith that he is injured and hath damage to the
" value of forty pounds: And thereupon he brings this
" ſuit, &c.

" And now at this day, to wit, *Friday* next after the [727]
" morrow of the *Holy Trinity* in this ſame term, until Not guilty, and iſſue.
" which day the ſaid *John* had leave to imparle to the
" ſaid bill, and then to anſwer, &c. before the lord the
" king at *Weſtminſter*, comes as well the ſaid *Thomas* by
" his ſaid attorney, as the ſaid *John* by *Samuel Brewſter*
" his attorney: And the ſaid *John* defends the force and
" injury, when, &c., and ſaith that he is not thereof
" guilty; and of this he puts himſelf upon the country;
" and the ſaid *Thomas* likewiſe, &c. Therefore let a jury
" thereupon come before the lord the king at *Weſtminſter*,
" on —— day next after ——; and who neither, &c. Venire awarded.

" to

" to recognize, &c. becauſe as well, &c. The ſame day
" is given to the ſaid parties there, &c.

Niſi prius. " Afterwards proceſs being thereupon continued be-
" tween the ſaid parties of the aforeſaid plea, by the jury's
" being reſpited there between them thereupon, before
" our lord the king at *Weſtminſter*, until *Saturday* next
" after three weeks from the day of *Saint Michael*, unleſs
" the juſtices of our lord the king aſſigned to take the aſ-
" ſizes in the county of *Dorſet*, on *Thurſday* the twenty-
" ſecond day of *July*, at *Dorcheſter* in the county aforeſaid,
" by the form of the ſtatute, &c., ſhould firſt come for de-
" fault of jurors, &c. At which day, before the lord the
" king at *Weſtminſter*, cometh the ſaid *Thomas Turbervile*
" the younger, by his ſaid attorney, and the ſaid juſtices
" before whom, &c. have ſent hither their record before
Poſtea and ver- " them, had in theſe words, to wit, Afterwards on the day
dict. " and place within contained, before Sir *Edward Ward*,
" Knt. chief baron of the Exchequer of the lord the king, and
" Sir *Thomas Rokeby*, Knt. one of the juſtices of the lord
" the king aſſigned to hold pleas before the king himſelf,
" juſtices of our ſaid lord the king aſſigned to take aſſizes
" in the county of *Dorſet*, by the form of the ſtatute, &c.
" came the within-named *Thomas Turbervile* the younger,
" Eſq. by his attorney within mentioned, and the within-
" written *John Stampe*, Gent. although ſolemnly required,
Defendant's de- " did not come, but made default: Therefore let the
fault. " jury, whereof mention is made, be taken againſt him
" by default, and the jurors of that jury being ſummoned,
" ſome of them, to wit, *Thomas Notting*, *Henry Kelloway*,
" *Richard Hambourne*, *John Ford*, *David Hayward*, *Mark*
" *Dowland*, *Henry Humber*, *James Squib*, *Robert Wool-*
" *frays*, came and are ſworn into that jury; and becauſe
" the reſt of the jurors of the ſame jury did not appear,
" therefore other perſons then preſent being choſen for
" this purpoſe are appointed a-new by the ſheriff of the
" county aforeſaid, at the requeſt of the aforeſaid *Thomas*
" *Turbervile*, and by the mandate of the aforeſaid juſ-
" tices, whoſe names are affiled in the panel within writ-
" ten, according to the form of the ſtatute in ſuch caſe
" lately made and provided: And a jury being appointed
" a-new, namely *John Warren*, *William Buſſel*, and *Na-*
" *thaniel Payne*, ſummoned in like manner, come, and to-
" gether with the other jurors aforeſaid firſt for this pur-
[728] " poſe impanelled and ſworn, being choſen, elected, tried,
Verdict for " and ſworn to ſpeak the truth touching the within con-
plaintiff. " tents, upon their oath ſay, that the aforeſaid *John Stampe*
" is guilty of the within-written premiſes within laid to
" his charge, as the ſaid *Thomas Turbervile* thereupon

" within

" within complaineth againſt him, and aſſeſs the damages
" of him the ſaid *Thomas*, by the occaſion within written,
" beſides his coſts and charges by him concerning his ſuit
" in this behalf applied, to eighty pounds, and for the ſaid
" coſts and charges to forty ſhillings: Therefore it is con- Judgment.
" ſidered, that the ſaid *Thomas Turbervile* do recover
" againſt the aforeſaid *John Stampe* his ſaid damages by
" the ſaid jury in form aforeſaid aſſeſſed, and alſo eleven
" pounds of his coſts and charges for the increaſe, ad- Increaſe of da-
" judged by the Court of the ſaid lord the king now here mages.
" to the ſame *Thomas Turbervile* by his aſſent, which ſaid
" damages in the whole amount to thirty-one pounds;
" and the ſaid *John*, in mercy," &c.

Pleas before the Lord the King at Weſtminſter, *of the Term of the* Holy Trinity *in the Tenth Year of the Reign of our Lord* William *the Third, now King of* England, &c. *Roll* 162.

Robins *againſt* Robins.

[3 Ld. Raym. Entries 446. S. C.]

Cornwal, " BE it remembered, That heretofore, to Salk. 15. Caſes
to wit, " wit, in the term of *Eaſter* laſt paſt, before B. R. 273. S.C.
" our lord the king at *Weſtminſter*, came *Stephen Robins*, Caſe for arreſting
" Gentleman, by *Edward Hoblyn* his attorney, and brought a man by colour
" into the court of the ſaid lord the king then there his of proceſs and
" certain bill againſt *John Robins*, Gentleman, in the cuſ- holding him to
" tody of the marſhal, &c., of a plea of debt; and there bail, where none
" are pledges of proſecuting, that is to ſay, *John Doe* and was required by
" *Richard Roe*; which ſaid bill followeth in theſe words, law, after tender-
" to wit, *Cornwal*, to wit, *Stephens Robins*, Gentleman, com- ing a common
" plains of *John Robins*, Gentleman, in the cuſtody of the appearance.
" marſhal of the *Marſhalſea* of our lord the king, before
" the king himſelf being, for that, to wit, That whereas
" the ſaid *John* never had any lawful cauſe of action
" againſt the ſame *Stephen*, ſo that by the law of this realm
" of *England* the body of the ſaid *Stephen* ought for the
" ſame to be taken, and in priſon detained until the ſaid
" *Stephen* ſhould find ſufficient bail to anſwer the ſaid
" *John* in the ſame cauſe: Nevertheleſs the ſaid *John* [729]
" knowing the premiſes, but contriving and maliciouſly
" intending him the ſaid *Stephen* in this behalf illegally to

" burthen, oppreſs, and damnify, and to injure and leſſen " his credit and reputation as much as in him was, he the " ſaid *John*, on the twenty-eighth day of *May* in the " ninth year of the reign of our lord *William* the Third, " now King of *England*, &c., at *Bodmyn* in the county " aforeſaid, cauſed the ſame *Stephen*, by pretence and co- " lour of a certain proceſs in the law, to be arreſted; " and although he the aforeſaid *Stephen* was always ready " to appear upon ſuch proceſs at the day of the return " thereof to anſwer the ſaid *John* according to the exi- " gency of the ſame proceſs; yet the ſaid *John* maliciouſly " procured and cauſed the ſame *Stephen*, on the day and " year aforeſaid, at *Bodmyn* aforeſaid, to be impriſoned, " and there in priſon to be detained by the ſpace of ſix " months, for that only that the aforeſaid *Stephen* could " not find ſufficient bail to anſwer the ſaid *John* upon the " ſaid proceſs; by which the ſaid *Stephen* was forced to " expend great ſums of money for his ſuſtenance in priſon " aforeſaid; and the neceſſary buſineſs of the ſaid *Stephen* " for that time remained undone, and the ſame *Stephen* " in his manner of living was greatly injured, to the great " diſturbance of his mind, and the manifeſt detriment of " his fame and credit: Wherefore the ſaid *Stephen* ſaith " that he is injured and hath damage to the value of one " hundred and fifty pounds: And therefore he brings " ſuit, &c.

" And now at this day, to wit, *Friday* next after the " morrow of the *Holy Trinity* in this ſame term, until " which day the ſaid *Stephen* had leave of imparling to the " aforeſaid bill, and then to anſwer, &c. before the lord " the king at *Weſtminſter*, cometh as well the aforeſaid " *Stephen* by his ſaid attorney, as the aforeſaid *John* by " *Joſeph Sherwood* his attorney; and the ſaid *John* defends " the force and injury, when, &c., and ſaith that he is not " thereof guilty; and of this he puts himſelf upon the " country; and the ſaid *Stephen* thereupon likewiſe, &c. " Therefore let a jury come thereupon before the lord the " king at *Weſtminſter*, on *Wedneſday* next after three " weeks from the day of the *Holy Trinity*, and who nei- " ther, &c. to recognize, &c., becauſe as well, &c. The " ſame day is given to the ſaid parties there," &c.

Not guilty pleaded.

Pleas before our Lord the King at Weſtminſter, *of the Term of* St. Hilary *in the Ninth Year of the Reign of our Lord* William *the Third now King of* England, &c. *Roll* 437.

Iveſon *againſt* Moore and others.

[3 Ld. Raym. Entries 436. S. C.]

Yorkſhire, " BE it remembered that heretofore, to wit, to wit, " in the term of *St. Michael* laſt paſt, be- " fore the lord the king at *Weſtminſter*, came *Henry Ive-* " *ſon* by *Edmund Barker* his attorney, and brought into " the court of our ſaid lord the king then there his certain " bill againſt *John Moore*, Eſq. and *Ruth* his wife, *Samuel* " *Wright*, *Jeremiah Lobley*, *Henry Smith*, and *Peter Bla-* " *key*, in the cuſtody of the marſhal, *&c.*, of a plea of " treſpaſs upon the caſe; and there are pledges of proſe- " cuting, namely, *John Doe* and *Richard Roe*; which ſaid " bill followeth in theſe words, that is to ſay, *Yorkſhire*, " to wit, *Henry Iveſon* complains of *John Moore*, Eſq. and " *Ruth* his wife, *Samuel Wright*, *Jeremiah Lobley*, *Henry* " *Smith*, and *Peter Blakey*, in the cuſtody of the marſhal " of the *Marſhalſea* of our lord the king, before the king " himſelf being, for that, to wit, that whereas the ſaid " *Henry Iveſon*, on the fourteenth day of *May* in the ninth " year of the reign of our lord *William* the Third, now " King of *England*, *&c.*, and long before and always af- " terwards, until this time, was poſſeſſed and ſtill is poſ- " ſeſſed, for a certain term of years then and yet to come " and unexpired, of and in a certain colliery and mine of " coals, being under the ground and land, and in the " bowels of a certain cloſe or land, ſituate and lying in the " pariſh of *Whitkirke*, otherwiſe *Whitchurch*, in the county " aforeſaid, called *Whitkirke*, otherwiſe *Whitchurch-fields*, " and near adjacent to the king's common highway in the " pariſh aforeſaid, leading on the north part from the vil- " lage of *Wetherby* in the county aforeſaid, in, by, and " over a certain moor there called *Winmore*, and from " thence in, by, and through a certain lane there called " *Anliſhaw Lane*, and from thence in, by, and through the " village of *Whitkirke*, otherwiſe *Whitchurch* aforeſaid, " and ſo back again, and alſo of and in a certain other " colliery and mine of coals being under the ground and " land, and in the bowels of a certain cloſe of moor or " parcel of land, in the pariſh aforeſaid, called *Halton*

Salk. 15. Comb. 480. Carth. 451. Caſes B. R. 162. Holt 10. S. C.

Declaration, ſetting forth, that he was poſſeſſed of a certain term of years in a colliery adjoining to the highway.

" *Moor*, ſituate and lying, and likewiſe near adjacent to
" the king's common highway aforeſaid, leading on the
" north part from the village of *Wetherby* aforeſaid, in,
[731] " by, and over the ſaid *Winmore* moor, and from thence
" in, by, and through the lane aforeſaid, called *Anliſhaw*
" *Lane*, and from thence in, by, and through the village
" of *Halton* in the county aforeſaid, and ſo back again, in,
" by, and through which ſaid lane called *Anliſhaw Lane*,
" the coals got and dug out of the mine aforeſaid were
" wont and intended to be carried and conveyed, as mat-
" tets fell out, from the cloſes aforeſaid, to the places
" neighbouring and adjacent: And whereas alſo on the
" ſame fourteenth day of *May*, the aforeſaid *Henry Iveſon*
And had great quantities of coals ready dug for ſale. " had a great quantity, to wit, two hundred cart-loads of
" coals dug out of the mine aforeſaid, ſeverally ready to
" be expoſed to ſale in the cloſes aforeſaid, they the ſaid
" *John*, *Ruth*, *Samuel*, *Jeremiah*, *Henry Smith*, and *Peter*,
" being not ignorant of the premiſes, but contriving and
" fraudulently and maliciouſly intending to hinder, de-
" ceive, and defraud the ſame *Henry Iveſon* of the uſe and
" benefit of his coals aforeſaid, and to alienate and ſeduce
" the buyers of the coals dug out of the colliery aforeſaid
" from the ſaid colliery, and to appropriate and procure
" them to the colliery of the ſaid *John Moore* near adjacent
But the defendants maliciouſly intending to hinder buyers, did ſtop up the way. " in the pariſh aforeſaid, afterwards, to wit, the aforeſaid
" fourteenth day of *May* in the ninth year of the reign of
" our ſaid lord the now king aboveſaid, did lay and place
" four cart-loads of great ſtones, and one root of a great
" aſh in the ſaid way in the lane aforeſaid, at the pariſh
" aforeſaid, and continued and permitted the ſtones and
" root of the aſh aforeſaid there to remain for the ſpace of
" one month, by which ſaid ſtones, and the root of the
" aſh aforeſaid, the aforeſaid way, in, by, and through
" the lane aforeſaid, was ſo much ſtopped up and ob-
" ſtructed, that the carts and carriages for the carrying
" and conveying of the coals gotten and dug out of the
" coilliery and mine aforeſaid, could not paſs in, by, and
Whereby the plaintiff loſt the ſale of his coals. " through the ſaid way, by the lane aforeſaid; by which
" the ſame *Henry Iveſon* totally loſt the benefit, profit, and
" advantage of his ſaid colliery for the whole time afore-
" ſaid; and the coals gotten from the colliery aforeſaid,
" for want of buyers, ſo hindered and obſtructed for the
" reaſons aforeſaid, became greatly damaged and depre-
" ciated, to the damage of the ſaid *Henry* of fifty pounds:
" And therefore he brings ſuit, *&c.*

Imparlance. " And now at this day, to wit, *Monday* next after eight
" days from the day of *St. Hilary* in this ſame term, until
" which day the aforeſaid *John Moore* and *Ruth* his wife,
" *Samuel*, *Jeremiah*, *Henry Smith*, and *Peter*, had leave of
" imparling

" imparling to the ſaid bill, and then to anſwer, &c. be-
" fore the lord the king at *Weſtminſter*, comes as well the
" ſaid *Henry Iveſon* by his ſaid attorney, as the aforeſaid
" *John Moore* and *Ruth* his wife, *Samuel*, *Jeremiah*, *Henry*
" *Smith*, and *Peter*, by *Michael Johnſon* their attorney:
" And the ſame *John Moore* and *Ruth*, *Samuel*, *Jeremiah*,
" *Henry Smith*, and *Peter*, defend the force and injury,
" when, &c. and ſay that they are not guilty of the pre- Not guilty
" miſes above laid to their charge in manner and form as pleaded.
" the aforeſaid *Henry Iveſon* above complains againſt
" them: And of this they put themſelves upon the [732]
" country; and the aforeſaid *Henry Iveſon* likewiſe, &c.
" Therefore let a jury come thereupon before the lord the
" king at *Weſtminſter*, on *Saturday* next after the morrow of
" the Purification of the Bleſſed Virgin *Mary*; and who
" neither, &c. to recognize, &c. becauſe as well, &c.
" The ſame day is given to the ſaid parties there," &c.

Pleas before the Lord the King at Weſtminſter, *of the Term of* St. Michael *in the Tenth Year of the Reign of our Lord* William *the Third, now King of* England, &c. *Roll* 125.

Butcher *againſt* Andrews.

Eſſex, to wit, " BE it remembered, That heretofore, to wit, " in the term of *Eaſter* laſt paſt, before the " lord the king at *Weſtminſter*, came *Thomas Butcher* by " *Ralph Cole* his attorney, and brought into the court of " the ſaid lord the king then there his certain bill againſt " *James Andrews*, in cuſtody of the marſhal of the *Mar-* " *ſhalſea*, &c. of a plea of treſpaſs upon the caſe; and there " are pledges of proſecuting, namely, *John Doe* and " *Richard Roe*; which ſaid bill followeth in theſe words, " that is to ſay, *Eſſex*, to wit, *Thomas Butcher* complains " of *James Andrews* in the cuſtody of the marſhal of the " *Marſhalſea* of our lord the king, before the king being, " for that to wit, That whereas the aforeſaid *James* on the " firſt day of *Auguſt* in the eighth year of the reign of " our lord *William* the Third, now king of *England*, &c. " at *Geſtingthorpe* in the county aforeſaid, in conſideration " that the ſame *Thomas Butcher*, at the ſpecial inſtance " and requeſt of him the ſaid *James*, would lend and ac- " commodate to one *George Andrews*, ſon of the ſaid

Salk. 23. Carth. 446. Comb. 473. 3 Salk. 15. Holt 606. S. C.

Declares in conſideration he would lend the defendant's ſon a ſum not exceeding 5 l. or truſt him for goods of that value, he would pay.

" *James Andrews*, any ſum or ſums of money, and " would ſell and deliver to the ſame *George* ſuch goods, " wares, and merchandize, as he the ſame *George* ſhould " want and require, and would truſt the ſaid *George* for " the ſame, ſo that the ſaid ſums of money ſo as aforeſaid " to be lent, and the value of the ſaid goods, wares, and " merchandizes to the ſaid *George Andrews* by the afore- " ſaid *Thomas Butcher* to be delivered and ſold, ſhould not " in the whole exceed the ſum of five pounds of lawful [733] " money of *England*, took upon himſelf, and then and " there faithfully promiſed the ſame *Thomas Butcher*, that " he the aforeſaid *James* would well and truly pay and " ſatisfy to the ſaid *Thomas Butcher* not only all ſuch ſums " of money ſo to be lent and accommodated by him the " ſaid *Thomas Butcher* to the ſaid *George Andrews*, but alſo " all ſuch ſums of money as the goods, wares and mer- " chandizes aforeſaid at the time of the ſale and delivery " thereof ſhould be reaſonably worth, when he after- " wards ſhould be requeſted: And the ſaid *Thomas* Averment. " *Butcher* in fact ſaith, that he the ſame *Thomas Butcher* " afterwards, to wit, on the ſame firſt day of *Auguſt* in the " eighth year aboveſaid, at *Geſtingthorpe* aforeſaid, in the " county aforeſaid, at the ſaid ſpecial inſtance of him the " ſaid *James*, did lend and accommodate to the ſaid *George* " *Andrews* the ſum of thirty ſhillings of lawful money of " *England*, and on the ſame day, year, and place laſt " aboveſaid, at the aforeſaid ſpecial inſtance and requeſt " of him the ſaid *James*, ſold and delivered to the ſame " *George Andrews* divers goods, wares, and merchandizes, " and truſted the aforeſaid *George* for the ſame; and that " the goods, wares, and merchandizes aforeſaid, at the " time of the ſelling and delivery thereof, were reaſon- " ably worth the ſum of three pounds and ten ſhillings of " like lawful money of *England*, to wit, at *Geſtingthorpe* " aforeſaid, in the county aforeſaid, whereof the ſaid *James* " afterwards, that is to ſay, on the ſame firſt day of *Auguſt* " in the year aboveſaid, at *Geſtingthorpe* aforeſaid, in the " county aforeſaid, then and there had notice by the ſame Indeb. aſſumpſit for 5 l. lent the ſon at the plaintiff's requeſt. " *Thomas Butcher*: And whereas alſo the ſaid *James* af- " terwards, to wit, on the ſame firſt day of *Auguſt* in the " eighth year aboveſaid, at *Geſtingthorpe* aforeſaid, in the " county aforeſaid, was indebted to the ſame *Thomas* " *Butcher* in five pounds of like lawful money of *Eng-* " *land*, for ſuch ſum of money of him the ſaid *Tho-* Indebitatus aſſumpſit for other 5 l. laid out, &c. " *mas Butcher*, by the aforeſaid *Thomas Butcher*, at the " like ſpecial inſtance and requeſt of him the ſaid *James*, " to the ſame *George Andrews* before that time lent and " accommodated; and alſo was indebted to the ſame " *Thomas Butcher* in other five pounds of like lawful mo-

" ney

" ney of *England*, for divers goods, wares, and merchan-
" dizes by the ſaid *Thomas Butcher* to the aforeſaid *George*
" *Andrews*, at the like ſpecial inſtance and requeſt of the
" ſame *James*, before that time ſold and delivered; and
" the ſaid *James* being ſo indebted to the ſaid *Thomas*
" *Butcher*, he the ſaid *James*, in conſideration thereof, af-
" terwards, to wit, on the ſame firſt day of *Auguſt* in the
" eighth year aforeſaid, at *Geſtingthorpe* aforeſaid, in the
" county aforeſaid, took upon himſelf, and then and there
" in like manner lawfully promiſed that he the ſaid *James*
" would well and faithfully pay and ſatisfy the aforeſaid
" ſeveral ſums of five pounds, and five pounds laſt men-
" tioned, to the ſame *Thomas Butcher*, when afterwards he
" ſhould be thereunto requeſted. And whereas alſo the
" ſaid *James* afterwards, to wit, on the ſame firſt day of
" *Auguſt* in the eighth year aboveſaid, at *Geſtingthorpe*
" aforeſaid, in the county aforeſaid, was indebted to the [734]
" ſame *Thomas Butcher* in other five pounds of like lawful
" money of *England*, for ſo much money of him the ſaid
" *Thomas Butcher*, by the ſame *Thomas Butcher*, at the like
" ſpecial inſtance and requeſt of the ſaid *James*, for the
" ſame *James* before that time expended and laid out;
" and he the ſaid *James* being thereupon ſo indebted to
" the ſame *Thomas Butcher*, he the ſaid *James*, in conſi-
" deration thereof, afterwards, to wit, the ſame day and
" year laſt aboveſaid, at *Geſtingthorpe* aforeſaid, in the
" county aforeſaid, did take upon himſelf, and then and
" there in the like manner did faithfully promiſe the ſaid
" *Thomas Butcher*, that he the ſaid *James* would well and
" truly pay and ſatisfy the aforeſaid five pounds laſt men-
" tioned to the ſame *Thomas Butcher*, when he ſhould be
" afterwards thereunto requeſted. Nevertheleſs the afore- Breach.
" ſaid *James* in nowiſe regarding his ſeveral promiſes and
" undertakings aforeſaid in form aforeſaid made, but
" contriving and fraudulently intending craftily and ſub-
" tilly to deceive and defraud the ſaid *Thomas Butcher*,
" hath not yet paid the aforeſaid ſeveral ſums of money,
" or any part thereof, to the ſaid *Thomas Butcher*, nor
" hath hitherto in anywiſe contented him for the ſame,
" (although to do this the ſame *James* afterwards, to wit,
" on the ſecond day of *Auguſt* in the eighth year above-
" ſaid, at *Geſtingthorpe* aforeſaid, in the county aforeſaid,
" was requeſted by the ſame *Thomas Butcher*,) but hath
" hitherto altogether refuſed and ſtill doth refuſe to pay
" them to him, or any ways to content him for the ſame,
" to the damage of him the ſaid *Thomas Butcher* of thirty
" pounds: And therefore he brings ſuit, *&c.*

" And now at this day, to wit, *Monday* next after three
" weeks from the day of *St. Michael* in this ſame term,

" until which day the aforeſaid *James* had leave to im-
" parle to the aforeſaid bill, and then to anſwer, &c. be-
" fore our lord the king at *Weſtminſter* comes as well the
" aforeſaid *Thomas* by his ſaid attorney, as the aforeſaid
" *James* by *John Clarke* his attorney: And the ſame
Non aſſumpſit pleaded. " *James* defends the force and injury, &c. and ſaith that
" he did not take upon himſelf in manner and form as
" the aforeſaid *Thomas* above complains againſt him:
" And of this he puts himſelf upon the country; and
" the aforeſaid *Thomas* in like manner, &c. Therefore
" let a jury come thereupon before the lord the king at
" *Weſtminſter*, on —— next after —— and who neither,
" &c. to recognize, &c. becauſe as well, &c. The ſame
" day is given to the parties aforeſaid there," &c.

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[735] *Pleas before our Lady the Queen at* Weſtminſter, *of the Term of* St. Hilary *in the Firſt Year of the Reign of our Lady* Anne, *now Queen of* England, &c. *Roll* 435.

Coggs *againſt* Bernard.

[3 Ld. Raym. Entries 240. S. C.]

Salk. 26. 3 Salk. 11, 268. Holt 13, 131, 528. S. C.

Declaration upon defendant's promiſe to take hogſheads of brandy out of one cellar and ſafely put them in another; for negligence.

Middleſex, to wit, " BE it remembered, That heretofore, to wit, " wit, in the term of *St. Michael* laſt paſt,
" before our lady the queen at *Weſtminſter*, came *John*
" *Coggs* by *Joſeph Sherwood* his attorney, and brought
" into the court of our ſaid lady the queen then there
" his certain bill againſt *William Bernard*, in the cuſtody
" of the marſhal, &c. of a plea of treſpaſs upon the caſe;
" and there are pledges of proſecuting, that is to ſay,
" *John Doe* and *Richard Roe*; which ſaid bill followeth
" in theſe words, that is to ſay, *Middleſex*, to wit, *John*
" *Coggs* complains of *William Bernard*, in the cuſtody of
" the marſhal of the *Marſhalſea* of our lady the queen,
" before the queen herſelf being, for that, to wit, That
" whereas the aforeſaid *William*, on the tenth day of *No-*
" *vember* in the thirteenth year of the reign of our lord
" *William* the Third, late king of *England*, &c. at the
" pariſh of *St. Clement Danes* in the county of *Middleſex*
" aforeſaid, had undertaken ſafely and ſecurely to take up
" divers caſks of brandy of the ſaid *John*, then being in a
" certain cellar ſituate in a certain place called *Brooks-*

" *Market*

" *Market* in the pariſh of *St. Andrew Holborn* in the " county aforeſaid; and had undertaken to put the ſame " ſafely and ſecurely in a certain other cellar ſituate in a " certain other place called *Water-ſtreet* in the pariſh of " *St. Clement Danes* in the county aforeſaid, the ſame " *William* his ſervants and agents afterwards, to wit, the " ſame day and year, at the pariſh of *Saint Clement Danes* " aforeſaid, handled the caſks of brandy aforeſaid ſo ne- " gligently and improvidently in putting them in the cel- " lar laſt mentioned, that for want of good care of the " ſaid *William*, his ſervants and agents, one of the ſaid " caſks of brandy then and there was broken, and a great " quantity, to wit, one hundred and fifty bottles of the " brandy aforeſaid in the ſame caſk, was by that occaſion " poured out upon the ground and ſpoiled. And whereas " alſo the aforeſaid *William*, afterwards, to wit, on the " ſame tenth day of *November* in the thirteenth year " aboveſaid, at *St. Clement Danes* aforeſaid in the county " of *Middleſex* aforeſaid, had undertaken ſafely and ſe- " curely to take up divers other caſks of brandy of the ſaid " *John*, then being in a certain other cellar ſituate in a " certain place called *Brooks-Market* in the pariſh of *St.* [736] " *Andrew Holborn* in the county aforeſaid, and to place " thoſe caſks there on a carr to be carried to a certain " other cellar ſituate in a certain other place called *Water-* " *ſtreet* in the pariſh of *St. Clement Danes* in the county " aforeſaid, and the ſaid caſks ſo as aforeſaid, carried to " the laſt-mentioned cellar ſituate in *Water-ſtreet* afore- " ſaid, from the ſaid carr ſafely and ſecurely there to let " down, and place in the cellar laſt mentioned; the ſame " *William*, his ſervants and agents afterwards, to wit, the " ſame day and year aboveſaid, at the pariſh of *St. Cle-* " *ment Danes* aforeſaid in the county aforeſaid, ſo negli- " gently and improvidently handled the ſaid caſks of " brandy laſt mentioned in laying them in the cellar laſt " mentioned, that for want of due care of the ſaid *Wil-* " *liam*, his ſervants and agents, one of the ſame caſks of " brandy laſt mentioned was then and there broken, and " a great quantity, to wit, one hundred and fifty bottles " of the brandy laſt mentioned being in the ſame caſk laſt " aboveſaid, was by that occaſion then and there ſpilt " upon the ground and deſtroyed: Wherefore the ſaid " *John* ſaith, that he is injured and hath damage to the " value of one hundred pounds. And therefore he brings " ſuit, *&c.*

" And now at this day, to wit, *Saturday* next after eight " days from the day of *Saint Hilary* in this ſame term, un- " til which day the ſaid *William Bernard* had leave of im- " parling to the ſaid bill, and then to anſwer, *&c.* before

" our lady the queen at *Weſtminſter*, comes as well the
" aforeſaid *John Coggs* by his ſaid attorney, as the ſaid
" *William Bernard* by *William Collier* his attorney; and
" the ſame *William Bernard* defends the force and injury,
Not guilty. " when, &c., and ſaith that he is not guilty thereof; and
" of this he putteth himſelf upon the country; and the
" before-ſaid *John Coggs* in like manner, &c. There-
" fore let a jury thereupon come before our lady the queen
Venire awarded. " at *Weſtminſter*, on *Monday* next after the morrow of the
" Purification of the Bleſſed *Mary*, and who neither, &c.
" to recognize, &c., becauſe as well, &c. The ſame day
" is given to the parties aforeſaid there, &c.

Poſtea continued. " Afterwards proceſs thereon is continued between the
" parties aforeſaid of the plea aforeſaid by the jury re-
" ſpited thereupon between them before our lady the
" queen at *Weſtminſter*, until *Thurſday* next after the mor-
" row of the Purification of the Bleſſed *Mary* then next
" following, unleſs the truſty and well beloved of our
" lady the queen, Sir *John Holt*, Knt. Chief Juſtice of
" our lady the queen appointed to hold pleas in the court
" of our ſaid lady the queen, before the queen herſelf,
" come before on *Wedneſday* next after eight days from
" the day of the Purification of the Bleſſed *Mary* at *Weſt-*
" *minſter* aforeſaid in the county of *Middleſex* aforeſaid,
" in the great hall of pleas there, according to the form
" of the ſtatute, &c., for want of jurors, &c.

" At which day before our lady the queen at *Weſt-*
" *minſter* comes the aforeſaid *John Coggs* by his ſaid at-
[737] " torney, and the aforeſaid Chief Juſtice of our lady the
Poſtea returned. " queen, before whom, &c. ſent here his record before
" him had in theſe words, Afterwards. at the day and
" place within contained before *John Holt*, Knt., Chief
" Juſtice within written, having aſſociated to himſelf *John*
" *Ince*, gent. by form of the ſtatute, &c., comes as well
" the within named *John Coggs* as the within named *Wil-*
" *liam Bernard*, by their attornies within mentioned: And
" the jurors of that jury being ſummoned likewiſe come,
" who being choſen, tried, and ſworn to ſpeak the truth
" of the within contents, upon their oath ſay, that the
" aforeſaid *William Bernard* is guilty of the premiſes
" within laid to his charge, in manner and form as the
" aforeſaid *John Coggs* within thereupon complaineth
" againſt him, and aſſeſs the damages of him the ſaid
" *John Coggs*, by occaſion thereof, beſides his coſts and
" charges by him applied about his ſuit in this behalf, to
" ten pounds, and for thoſe coſts and charges to twenty
Judgment for the plaintiff. " ſhillings: Therefore it is conſidered, that the ſaid *John*
" *Coggs* do recover againſt the aforeſaid *William Bernard*
" the damages aforeſaid by the ſaid jury in form aforeſaid
" aſſeſſed,

" aſſeſſed, and alſo twenty and one pounds adjudged by " the Court of the ſaid lady the queen how here, to the " ſame *John Coggs* for his coſts and charges aforeſaid, by " his aſſent, of increaſe, which ſaid damages in the whole " amount to thirty-two pounds; and the ſaid *William* " *Bernard* in mercy," &c.

Pleas before the Lord the King at Weſtminſter, *of the Term of the* Holy Trinity *in the Ninth Year of the Reign of* William *the Third, now King of* England, &c.

Harriſon *againſt* Cage.

[3 Ld. Raym. Entries 403. S. C.]

Cambridgeſhire, to wit, " BE it remembered, That heretofore, " to wit, in the term of *Eaſter* in the " ninth year of the reign of our lord *William* the Third, " now King of *England*, &c., before the lord the king at " *Weſtminſter* came *Henry Harriſon* gentleman, by *Mi-* " *chael Johnſon* his attorney, and brought into the court of " the ſaid lord the king then there his certain bill againſt " *Adlard Cage* gentleman, and *Elizabeth* his wife, in the " cuſtody of the marſhal, &c., of a plea of treſpaſs upon " the caſe; and there are pledges of proſecuting, to wit, " * *John Doe* and *Richard Roe*; which ſaid bill followeth in " theſe words, that is to ſay, *Cambridgeſhire*, to wit, *Henry* " *Harriſon* gentleman complains of *Adlard Cage* gentle- " man and *Elizabeth* his wife, in the cuſtody of the mar- " ſhal of the *Marſhalſea* of the lord the king, before the " king himſelf being, for that, to wit, That whereas the " aforeſaid *Elizabeth*, whilſt ſhe was ſole, to wit, on the " firſt day of *April* in the eighth year of the reign of our " lord *William* the Third, now King of *England*, &c., at " *Borough-Green* in the county aforeſaid, (in conſideration " that the ſame *Henry* then and ſtill being a bachelor and " not married, at the ſpecial inſtance and requeſt of the " ſaid *Elizabeth*, then and there had agreed with the ſame " *Elizabeth*, and had taken upon himſelf and faithfully " promiſed the ſame *Elizabeth*, that he the ſame *Henry* " would marry the ſaid *Elizabeth*,) took upon herſelf and " then and there faithfully promiſed that ſhe the ſaid *Eli-* " *zabeth* would marry him the ſaid *Henry*; and although " the

5 Mod. 411. Salk. 24. Carth. 467. Caſes B. R. 214. Holt 456. S. C.

Caſe againſt huſband and wife upon promiſe of marriage by her when ſole.

* [738]

" the ſaid *Henry*, giving credit to the promiſe and aſſump-
" tion of the ſaid *Elizabeth*, altogether refuſed to contract
" matrimony with any other woman, and yet continueth
" a bachelor and unmarried, and always from the time of
" making the promiſe and aſſumption aforeſaid (whilſt the
" ſaid *Elizabeth* was ſingle) was ready and often offered
" legally to marry the ſame *Elizabeth*, to wit, at *Borough-*
Breach. " *Green* aforeſaid, in the county aforeſaid; nevertheleſs
" the ſaid *Elizabeth*, whilſt ſhe was ſole, not regarding
" her promiſe and aſſumption aforeſaid, but contriving
" and fraudulently intending craftily and ſubtilly to de-
" ceive and defraud the ſaid *Henry* in this behalf, hath
" not married him the ſaid *Henry*, (although ſo to do the
" aforeſaid *Elizabeth* after her promiſe and aſſumption
Requeſt and re- " aforeſaid made, to wit, on the twenty-ninth day of
fuſal. " *April* in the eighth year aboveſaid, and often before and
" afterwards, at *Borough-Green* aforeſaid, in the county
" aforeſaid, was by the ſaid *Henry* required,) but altoge-
" ther refuſed to marry him, and afterwards, to wit, on
" the firſt day of *October* in the eighth year aforeſaid, at
And marrying " *Borough-Green* aforeſaid, in the county aforeſaid, mar-
the defendant. " ried the aforeſaid *Adlard* contrary to the aforeſaid pro-
" miſe and aſſumption of the ſame *Elizabeth*: And
" whereas alſo the aforeſaid *Elizabeth*, whilſt ſhe was ſole,
" to wit, on the firſt day of *May* in the eighth year above-
" ſaid, was indebted to the ſame *Henry* in three hundred
" pounds of lawful money of *England*, for money by him
" the ſaid *Henry*, at the ſpecial inſtance and requeſt of the
" ſaid *Elizabeth* and for the ſame *Elizabeth* (while ſhe was
Indebit. aſſump. " ſole) before that time paid and laid out, and for money
for money laid " by the ſame *Elizabeth*, while ſhe was ſole, before that
out for and lent " time borrowed and received of the ſaid *Henry*, and being
to her when ſole. " ſo indebted thereupon, the ſaid *Elizabeth* (while ſhe was
" ſole) on the ſame day and year laſt mentioned, at *Bo-*
" *rough-Green* aforeſaid, in the county aforeſaid, in conſi-
" deration thereof undertook and then and there faithfully
" promiſed the ſaid *Henry*, that ſhe the ſaid *Elizabeth*
" would well and faithfully pay and ſatisfy to the ſaid
" *Henry* the ſame three hundred pounds: Nevertheleſs
[739] " the ſame *Elizabeth* (while ſhe was ſole) and the aforeſaid
" *Adlard* and *Elizabeth*, after the marriage between them
" celebrated, not regarding the promiſe and undertaking
" of the ſaid *Elizabeth* laſt mentioned in form aforeſaid
" made, but contriving and fraudulently intending the
" ſame *Henry* in this behalf craftily and ſubtilly to deceive
" and defraud, the before ſaid three hundred pounds have
" not paid, nor hath either of them paid any part thereof
" to the ſaid *Henry*, (although often requeſted,) but have
" altogether refuſed and yet do refuſe to pay the ſame to

" him, or anywiſe to content him for the ſame: Where-
" fore the ſaid *Henry* ſaith that he is injured and hath da-
" mage to the value of three thouſand pounds: And
" thereupon he brings ſuit, *&c.*

" And now at this day, to wit, *Wedneſday* next after
" the morrow of the *Holy Trinity* in this ſame term, until
" which day the aforeſaid *Adlard* and *Elizabeth* had leave
" to imparle to the ſaid bill, and then to anſwer, *&c.* be-
" fore the lord the king at *Weſtminſter* comes as well the
" ſaid *Henry* by his attorney aforeſaid, as the aforeſaid
" *Adlard* and *Elizabeth* by *Richard Edwards* their attor-
" ney: And the ſame *Adlard* and *Elizabeth* defend the
" force and injury, when, *&c.*, and ſay that the aforeſaid
" *Elizabeth* did not take upon herſelf in manner and form
" as the aforeſaid *Henry* above complains againſt them;
" and of this they put themſelves upon the country; and
" the ſaid *Henry* in like manner, *&c.* Therefore let a jury
" come thereupon before the lord the king at *Weſtminſter*,
" on *Wedneſday* next after three weeks from the day of
" the *Holy Trinity*: and who neither, *&c.* to recogniſe,
" *&c.* becauſe as well, *&c.* The ſame day is given to the
" aforeſaid parties there, *&c.* Afterwards the proceed- Poſtea continued.
" ings thereon are continued between the aforeſaid par-
" ties of the plea aforeſaid by the jury reſpited thereupon
" between them, before the lord the king at *Weſtminſter*,
" until *Monday* next after three weeks from the day of *St.*
" *Michael* from thence next following, unleſs the juſtices
" of the lord the king appointed to take aſſizes in the
" county aforeſaid, do firſt come on *Thurſday* the eleventh
" day of *Auguſt* at the caſtle of *Cambridge* in the county
" aforeſaid, by form of the ſtatute, *&c.* for want of jurors,
" *&c.* At which day, before the lord the king at *Weſt-*
" *minſter*, comes the ſaid *Henry* by his ſaid attorney, and
" the beforeſaid juſtices before whom, *&c.*, have ſent
" here their record had before them in theſe words, to
" wit, Afterwards at the day and place within contained, Poſtea returned.
" before Sir *Edward Ward*, Knt., Chief Baron of the Ex-
" chequer of our lord the king, and *Thomas Knight*, Eſq.,
" for this turn aſſociate to the ſaid Sir *Edward Ward*, and
" Sir *Thomas Rokeby*, Knt., one of the juſtices of the ſaid
" lord the king appointed to hold pleas before the king
" himſelf, the juſtices of our ſaid lord the king appointed
" to take aſſizes in the county of *Cambridge* by form of
" the ſtatute, *&c.*, the preſence of the ſaid *Thomas*
" *Rokeby* not being expected, by virtue of the writ of the
" ſaid lord the king of *ſi non omnes*, cometh the within- [740]
" named *Henry Harriſon* by his attorney within mention-
" ed, and the within written *Adlard Cage* and *Elizabeth*
" his wife, although ſolemnly required, do not come, but
" have

" have made default: Therefore let the jury whereof
" mention is within made be taken againſt them by de-
Defendants de- " fault; upon which the jurors of that jury being like-
fault. " wiſe ſummoned come, who being choſen, tried, and
" ſworn to ſpeak the truth of the within contents, upon
" their oath ſay, that the aforeſaid *Elizabeth* did take upon
Verdict for the " herſelf in manner and form as the aforeſaid *Henry*
plaintiff. " within complains againſt the ſaid *Adlard* and *Elizabeth*,
" and aſſets the damages of the ſame *Henry* by occaſion of
" the non-performance of the promiſes and undertakings
" within ſpecified, beſides his coſts and charges by him
" about his ſuit in this behalf applied, to four hundred
" pounds, and for thoſe coſts and charges to forty ſhil-
Judgment. " lings: Therefore it is conſidered, that the aforeſaid
" *Henry Harriſon* do recover againſt the aforeſaid *Adlard*
" *Cage* and *Elizabeth* his wife his aforeſaid damages by the
" jury aforeſaid in form aforeſaid aſſeſſed, and alſo fixteen
" pounds for his coſts and charges aforeſaid, adjudged by
" the Court of our ſaid lord the king now here to the ſaid
" *Henry* by his aſſent, of increaſe, which damages in the
" whole amount to four hundred and eighteen pounds;
" and the aforeſaid *Adlard* and *Elizabeth* in mercy, *&c.*

A writ of error in the Exche- " Afterwards, to wit, on *Saturday* the twenty-ſixth day
quer-chamber. " of *November*, in the tenth year of the reign of our lord
" *William* the Third, now king of *England*, *&c.* tran-
" ſcripts of the record and proceedings aforeſaid between
" the parties aforeſaid of the plea aforeſaid, with all
" things thereunto belonging, by pretence of a certain
" writ of the ſaid lord the king, of correcting errors pro-
" ſecuted by the aforeſaid *Adlard* and *Elizabeth* in the
" premiſes before the juſtices of the ſaid lord the king of
" the Common Pleas, and the Barons of the Exchequer
" of the ſaid lord the king of the degree of the coif in
" the chamber of the Exchequer aforeſaid, according to
" the form of the ſtatute made in the parliament of our
" lady *Elizabeth*, late queen of *England*, *&c.* held at
" *Weſtminſter* on the twenty-third day of *November* in the
" twenty-ſeventh year of her reign, were tranſmitted
" from the aforeſaid court of the ſaid lord the king here,
" before the king himſelf; and the aforeſaid *Adlard* and
" *Elizabeth* appearing in the ſame court of Exchequer-
Error aſſigned. " chamber, aſſigned certain matters for error to be had
" on the record and proceſs aforeſaid, for revoking and
" making void the judgment aforeſaid, to which the afore-
" ſaid *Henry* likewiſe appearing in the ſame court of Ex-
" chequer-chamber aforeſaid hath pleaded that there was
" nothing in anywiſe erroneous, either in the record and
" proceedings aforeſaid, or in the giving of the judgment
" aforeſaid; and afterwards, to wit, on *Tueſday* the twen-
" ty-ſeventh

" ty-ſeventh day of *June* in the eleventh year of the reign
" of our lord *William* the Third, now king of *England*,
" &c. as well the record and proceedings aforeſaid, and
" the judgment given upon the ſame, as the aforeſaid [741]
" cauſes by the ſaid *Adlard* and *Elizabeth* aſſigned and
" alleged for error, being ſeen, and by the court of Ex-
" chequer-chamber aforeſaid diligently examined and
" more fully underſtood; it ſeemed to the ſame Court of
" Exchequer-chamber aforeſaid, that the ſaid record is
" in nowiſe faulty or defective, and that the ſaid record
" was not anywiſe erroneous: Therefore it was then and Judgment af-
" there by the ſame Court of Exchequer-chamber afore- firmed.
" ſaid conſidered, That the judgment aforeſaid ſhould in
" all reſpects be affirmed and ſtand in all its force and
" effect, the ſaid cauſes and matters by the aforeſaid *Ad-*
" *lard* and *Elizabeth* aſſigned and alleged for error in any-
" wiſe notwithſtanding; and it was further then and
" there by the ſame Court conſidered, that the aforeſaid
" *Henry* ſhould recover againſt the ſaid *Adlard* and *Eliza-*
" *beth*, ten pounds and ten ſhillings, adjudged by the Court
" there to the ſaid *Henry* by his aſſent, according to the
" form of the ſtatute for that purpoſe made and pro-
" vided, for his damages, coſts, and charges, which he
" had by occaſion of the delay of execution of the judg-
" ment aforeſaid, by pretence of the proſecution of the
" ſaid writ of error; and thereupon the aforeſaid record, Coſts adjudged,
" and alſo the proceedings of the ſaid juſtices of the occaſioned by the
" Common Pleas aforeſaid, and the ſaid barons of the delay of execu-
" Exchequer aforeſaid, had before them in the premiſes tion and remit-
" before the lord the king, whereſoever, &c. were then tance of the re-
" by the ſame juſtices and barons ſent back accord- cord.
" ing to the form of the ſtatute, &c. and do now re-
" main in the Court of the lord the king here before the
" king himſelf, &c. Afterwards, to wit, on *Wedneſday*
" next after three weeks from the day of the *Holy Tri-*
" *nity* in the thirteenth year of the reign of our lord
" *William* the Third, now king of *England*, &c. before
" the ſaid lord the king at *Weſtminſter* cometh the afore-
" ſaid *Henry Harriſon* by his ſaid attorney, and acknow- Satisfaction ac-
" ledgeth himſelf to be ſatisfied by the aforeſaid *Adlard* knowledged.
" and *Elizabeth*, concerning the debt, damages, coſts, and
" charges aforeſaid: Therefore let the ſame *Adlard* and
" *Elizabeth* be thereupon acquitted of the ſaid debt, da-
" mages, coſts, and charges," &c.

Pleas before our Lady the Queen at Weſtminſter, *of the Term of* St. Michael *in the Firſt Year of the Reign of our Lady* Anne, *now Queen of* England, *&c. Roll* 223.

Juſtin *againſt* Ballin.

Salk. 34. S. C. *England*, " BE it remembered, That on *Friday* next
to wit, " after three weeks from the day of *St.*
" *Michael* in this ſame term, before the lady the queen
Suggeſtion, ſetting forth ſtatute of 13 Rich. 2. whereby the Admiralty have no cognizance of any thing done upon the land. " at *Weſtminſter*, comes *Nicholas Juſtin* in his proper perſon, and cauſes the Court of the ſaid lady the queen
" now here to underſtand and be informed, That whereas
" in the ſtatute made in the parliament of our lord
" *Richard* the Second, late king of *England* after the
" Conqueſt, held in the thirteenth year of his reign at
" *Weſtminſter* in the county of *Middleſex*, it is amongſt
" other things ordained and enacted by the authority of
" the ſame parliament, that admirals and their deputies
" from thence afterwards ſhould in no ſort intermeddle
" concerning any thing done within the kingdom of *Eng-*
" *land*, ſave only concerning a thing done upon the ſea, as
" was of right accuſtomed in the time of our lord *Edward*
" late king of *England*, grandfather of the ſame lord the
" king *Richard* the Second, as in the ſame ſtatute amongſt
Another ſtatute (15 R. 2.) to the ſame purpoſe. " other things is more fully contained: And whereas
" alſo by another ſtatute made in the parliament of the
" aforeſaid late king *Richard* the Second, in the fifteenth
" year of his reign, held at *Weſtminſter* aforeſaid in the
" ſaid county of *Middleſex*, it is amongſt other things de-
" clared, ordained, and eſtabliſhed, that the Court of Ad-
" miralty ſhould have no cognizance, power of juriſdic-
" tion of all contracts, pleas, and complaints, and of all
" other things done or ariſing within the bodies of coun-
" ties, as well by land as by water, and alſo of the wreck
" of the ſea, but that all ſuch contracts, pleas, and com-
" plaints, and all other things ariſing within the bodies of
" counties, as well by land as water, as aforeſaid, and alſo
" wreck of ſea, ſhould be determined, tried, diſcuſſed, and
" remedied by the law of the land, and not before the
" admiral or admirals, nor by his lieutenant in any man-
" ner as in the ſame ſtatute is alſo amongſt other things
Another ſtatute (2 H. 4.) confirming the former. " more fully contained: And whereas alſo in the parlia-
" ment of our lord *Henry* the Fourth, late king of *Eng-*
" *land* after the Conqueſt, held in the ſecond year of his
" reign at *Weſtminſter* in the county aforeſaid, it is amongſt
" other

" other things ordained and enacted, that the aforeſaid
" ſtatute of the aforeſaid year of our ſaid late King *Rich-*
" *ard* the Second, ſhould be held and kept and carried into
" due execution as in the ſame ſtatute amongſt other
" things is contained: And whereas alſo all and ſingular
" pleas and affairs touching or concerning the validity,
" explication, interpretation, conſtruction, or expoſition
" of any ſtatutes in all parliaments whatſoever of our ſaid
" lady the now queen, or her progenitors, late kings or
" queens of *England*, enacted, made, and provided, and
" all and ſingular pleas and conuſance of pleas for any
" treſpaſſes, contracts, treſpaſſes upon the caſe, for the
" taking, detaining, or converting of any goods or chat-
" tels, or for any other cauſe whatſoever, as well upon
" land as upon water, within the body of any county
" within this kingdom of *England*, or elſewhere upon
" land, happening, ariſing, emerging, done, or brought
" to any perſon or perſons, do ſpecially belong and apper-
" tain to our lady the now queen and her royal crown,
" and by the laws and ſtatutes of this realm of *England*
" ought, and from time paſt always hitherto were accuſ-
" tomed to be tried, determined, and diſcuſſed in the
" queen's temporal courts of record, before the lady the
" queen now here, or before her temporal juſtices or
" judges, and not before the lord admiral of *England*, nor
" by the admiral of *England*, or his lieutenant or deputy
" in any manner: Nevertheleſs one *John Ballam* and one
" *William Hart* not being ignorant of the premiſes, but
" contriving unjuſtly to burthen, oppreſs, and aggrieve
" the ſaid *Nicholas Juſtin*, contrary to due courſe of the
" law of this kingdom of *England*, and contrary to the
" form of the ſeveral ſtatutes aforeſaid, and to draw the
" conuſance of a plea which ſpecially belongs and apper-
" tains to our ſaid lady the now queen and her royal
" crown to another examination in the court of Admi-
" ralty before the Right Honourable Sir *Charles Hedges*,
" Knt. doctor of laws and ſupreme judge of the court of
" Admiralty of *England*, or his deputy or ſurrogate, or
" ſome other competent judge in that behalf, by virtue of
" a certain proceſs out of the ſaid court of Admiralty, for
" the proſecution of a ſhip called *The Swan of Norway*,
" whereof *Berent Gertſon* lately was, but *John Orce*, other-
" wiſe *Ord*, otherwiſe *Larwick*, is now maſter, and its
" rigging and appurtenances; and the ſaid *Nicholas Juſtin*
" being owner of the ſaid ſhip, for and concerning divers
" wares and merchandizes, works and labours by the
" aforeſaid *J. Ballam* and *W. Hart* ſold, delivered, done,
" found, and provided for the ſaid ſhip, out of the juriſ-
" diction of that court, unjuſtly drew into plea, warily and
" craftily

That the expoſition of the ſtatutes belongs to the courts temporal.

Breach.

By proceſs out of the Admiralty for goods and labour.

" craftily libelling and ſuggeſting againſt the ſaid ſhip,
" and the aforeſaid *Nicholas Juſtin* in the ſame court of
" Admiralty, amongſt other things, as followeth, that is
Libel ſet forth. " to ſay: *Firſt*, That in the month of *November* in the
" year of our Lord one thouſand ſeven hundred, and for
" ſeveral months before and after, the ſaid *Berent Gertſon*
" of *Norway* was the maſter and commander of the ſaid
" ſhip the *Swan*, and had the care and government of her
" as maſter, and was put in and appointed maſter of her
[744] " by her owner, who was then an inhabitant of *Norway*
" and a ſubject of the King of *Denmark*, but is ſince dead,
" and ſo much the ſaid *Berent Gertſon* hath confeſſed and
" declared, and this was and is true, public, and notorious,
" and alleges every thing jointly and ſeverally: *Alſo*, That
" in the ſaid month of *November*, in the year of our Lord
" one thouſand ſeven hundred, the ſaid ſhip the *Swan* be-
" ing upon the high and open ſeas near the port of *Lon-*
" *don*, within the juriſdiction of the High Court of the
" Admiralty of *England*, and then ſtanding in great need
" of a new cable, a coil of ſmall ratlin, a new anchor, and
" the other things mentioned in the two ſchedules here-
" unto annexed, the ſaid *John Ballam* and *William Hart*
" did thereupon, at the ſpecial inſtance and requeſt of the
" ſaid *Berent Gertſon*, then maſter and commander of the
" ſaid ſhip upon the high and open ſeas, and within the
" juriſdiction aforeſaid, furniſh and ſupply the ſaid ſhip
" with the cable, anchor, and other things mentioned in
" the ſaid two ſchedules, at the reſpective rates ſche-
" dulate, to wit, the ſaid *John Ballam* furniſhed and ſup-
" plied her with the cable, ſmall ratlin, and the other
" things mentioned in the firſt of the ſaid ſchedules
" N° 1, and at the rates there ſet down, amount-
" ing in all to the ſum of one hundred and four pounds
" fifteen ſhillings ſterling, and the ſaid *William Hart* fur-
" niſhed and ſupplied her with the anchor and the other
" things mentioned in the ſaid other ſchedule N° 2, and
" at the rates there ſet down, amounting in the whole to
" the ſum of nineteen pounds eleven ſhillings and ſix-
" pence ſterling, and the ſaid cable, anchor, and other
" things mentioned in the ſaid two ſchedules, were at the
" time and place aforeſaid ſent and delivered by the ſaid
" *John Ballam* and *William Hart*, or their order, on board
" the ſaid ſhip, and have ever ſince and now are belonging
" to her and applied to her uſe, and the ſame were, at
" the time of their being ſent and delivered on board the
" ſaid ſhip, really and truly worth the reſpective rates and
" ſums of money ſchedulate, and the like ſort of goods
" were then uſually ſold at the ſame rates; and this was
" and is true, public, and notorious, and ſo much the ſaid
" *Berent Gertſon* hath confeſſed and declared to ſeveral
" perſons,

" perſons, *but lays it of other good ſums at the time and place,*
" &c., *and as above: Alſo,* That the ſaid ſhip the *Swan,*
" ſhortly after the ſaid cable, anchor, and the other things
" mentioned in the ſaid two ſchedules, were ſent and de-
" livered on board her as aforeſaid, proceeded to *Norway,*
" and did then and ever, and now doth belong to that
" place, and the ſaid *Berent Gertſon* her late maſter, did,
" and do all reſide in *Norway,* and were and are ſubjects
" to the King of *Denmark;* and this was and is true, pub-
" lic, and notorious, and ſo much the ſaid *John Orce,*
" otherwiſe *Ord,* otherwiſe *Larwick,* hath lately confeſſed
" and declared to ſeveral perſons, and *ſets forth as above:*
" *Alſo,* That the ſaid ſeveral ſums of money mentioned in
" the ſaid two ſchedules, in all amounting in the whole to
" the ſum of one hundred twenty-four pounds ſix ſhil-
" lings and ſixpence ſterling, are really and truly due to
" the ſaid *John Ballam* and *William Hart,* for the ſaid [745]
" cable, anchor, and the other things ſchedulate, and the
" ſaid *John Orce,* otherwiſe *Ord,* otherwiſe *Larwick,* the
" preſent maſter of the ſaid ſhip, hath lately confeſſed and
" declared to ſeveral perſons, that the aforeſaid ſums of
" money are yet unpaid, and that it is ſo ſet down in in-
" ſtructions given him by the ſaid *Nicholas Juſtin* the
" owner of the ſaid ſhip, or to that effect, *as before: Alſo,*
" That the ſaid *John Ballam* and *William Hart* have ſe-
" veral times demanded the ſums of money due to them
" as aforeſaid, of the preſent maſter of the ſaid ſhip, per-
" ſonally, and of her ſaid owner by letters, but they re-
" fuſing or delaying to pay for the ſame, and the ſaid
" *John Ballam* and *William Hart* having no remedy for
" the recovery thereof, but by arreſting the ſaid ſhip in
" the High Court of Admiralty of *England,* have cauſed
" the ſame to be arreſted by virtue of a warrant from the
" ſaid Court, and all perſons having or pretending to
" have any right, title, or intereſt therein, to be duly
" cited to appear in the ſaid court to anſwer to them the
" ſaid *John Ballam* and *William Hart,* in a cauſe or cauſes
" civil and maritime; and the ſaid *Nicholas Juſtin* has
" there appeared by his proctor, and ſubmitted himſelf to
" the juriſdiction of the ſaid court, and as owner of the
" ſaid ſhip given bail to anſwer the action brought by the
" ſaid *John Ballam* and *William Hart* againſt the ſaid
" ſhip, and to abide by the judgment of the ſaid Court,
" and to pay what ſhall be adjudged, together with the
" expences of ſuit, and thereupon procured the ſaid ſhip
" to be releaſed from the ſaid arreſt, as by the proceedings
" of the ſaid Court, to which the party proponent refers
" himſelf, doth appear.

N° 1, *Delivered for the uſe of the ſhip* Swan *of* Longſound, *Mr.* Berent Gertſon, *Commander*, November *the* 16*th*, 1700, per John Ballam.

C.	q.	lb.		£.	s.	d.
59	1	10	A cable of 15, in full 120 fathom.			
0	1	3	A coil of ſmall ratlin.			
59	2	13	at 35 *s. per* hundred is	104	6	8
			One hand-line, 4 ſkains of marlin and houſen, — —	0	3	4
			Lighteridge on board, —	0	5	0
				104	15	0

[746] N° 2, *Smith's work to the ſhip* Swan, Berent Gertſon, *Maſter*, November *the* 25*th*, 1700, *by* William Hart.

	£.	s.	d.
For one new anchor, weighing 13 *C.* 24 *lb. per* contract, —	19	0	4
For one hundred five-inch nails, —	0	4	2
For one hundred four-inch nails, —	0	2	6
For two hundred of nails, —	0	3	0
For mending one pump-iron, —	0	1	6
	19	11	6

Averment, That the goods and work were for the ſhip in the river of Thames.

" Alſo that all and ſingular the premiſes were and are " true and notorious, as by a true copy of the aforeſaid " libel in the court of the ſaid lady the queen, before the " queen herſelf now here had, read, and heard, amongſt " other things more fully appears, when, in truth, the " wares and merchandizes, works, and labours aforeſaid, " were found, provided, done, ſold, and delivered for the " aforeſaid ſhip in the river of *Thames*, to wit, in the pa- " riſh of St. *Paul Shadwell*, in the county of *Middleſex*, " and not upon the high ſea, nor within the juriſdiction " of the Court of Admiralty aforeſaid, as by the libel " aforeſaid is above ſuppoſed; to all and ſingular which " matters the ſame *John Ballam* and *William Hart* un- " juſtly conſtrained him the ſaid *Nicholas Juſtin* to appear " in the ſaid Court of Admiralty, before the aforeſaid " judge of the ſame Court, concerning the premiſes, and " to anſwer the ſame *John Ballam* and *William Hart* of

" and concerning the ſame; and although the ſame *Ni-*
" *cholas Juſtin* in the ſaid Court of Admiralty, before the Plea in the Ad-
" aforeſaid judge of that court, did plead and allege all and miralty.
" ſingular the premiſes by him above ſuggeſted and al-
" leged for his diſcharge and diſmiſſion from thence in
" this behalf, and offered to prove the ſame by inevitable
" teſtimony and truth; yet the ſame judge of that court
" hath altogether refuſed and ſtill refuſes to admit the ſaid
" plea, allegation, and proof: And the beforeſaid *John*
" *Ballam* and *William Hart* do, with all their power, en-
" deavour and daily contrive to compel him the ſame *Ni-*
" *cholas Juſtin* to anſwer of and concerning the premiſes
" aforeſaid, and to be condemned in the premiſes by the
" ſentence and final decree of the Court of Admiralty
" aforeſaid, in contempt of the ſaid lady the now queen,
" in diſheriſon of her crown and dignity, and to the da-
" mage, impoveriſhment, and manifeſt grievance of the
" ſame *Nicholas*, and againſt the law and cuſtom of the
" realm of the ſaid lady the now queen of *England*, and
" alſo againſt the form and effect of the ſeveral ſtatutes
" aforeſaid in ſuch caſe in form aforeſaid made and pro-
" vided: And this the ſame *Nicholas Juſtin* is ready to
" verify: Wherefore the ſame *Nicholas*, humbly implor-
" ing the aid and bounty of the Court of the ſaid lady the
" queen, before the now queen herſelf, prays for himſelf
" a remedy, and a writ of prohibition of the ſaid lady the [747]
" queen here, to be directed to the ſaid judge of the Court
" of Admiralty aforeſaid, or to any other competent judge
" whatſoever in this behalf, to prohibit him or them that
" he or they hold not plea in any manner touching or con-
" cerning the premiſes aforeſaid, before him or them, *&c.*
" And it is granted to him," *&c.*

Pleas before the Lord the King at Weſtminſter, *of the Term of* Eaſter *in the Twelfth Year of the Reign of* William *the Third, now King of* England, *&c. Roll* 108.

Hillyard *againſt* Cox.

[3 Ld. Raym. Entries 468. S. C.]

Berkſhire, " BE it remembered, That heretofore, to Salk. 37.
to wit, " wit, in the term of St. *Michael* laſt paſt,
" before our lord the king at *Weſtminſter*, came *Daniel*

" *Hillyard* clerk, adminiſtrator of all and ſingular the
" goods and chattels, rights and credits, which were of
" *John Cox* deceaſed, at the time of his deceaſe, who died
" inteſtate, by *Edward Chapman* his attorney, and brought
" into the court of the ſaid lord the king then there his
" certain bill againſt *Thomas Cox* in the cuſtody of the
" marſhal, &c., of a plea of treſpaſs upon the caſe; and
" there are pledges of proſecuting, namely, *John Doe* and
" *Richard Roe*; which ſaid bill is in theſe words, that is
" to ſay, *Berkſhire*, to wit, *Daniel Hillyard* clerk, admi-
" niſtrator of all and ſingular the goods and chattels,
" rights and credits, which were of *John Cox* deceaſed, at
" the time of his death, who died inteſtate, complains of
" *Thomas Cox* in the cuſtody of the marſhal of the *Mar-*
Indebitatus aſſumpſit by an adminiſtrator for goods ſold and delivered by the inteſtate.
" *ſhalſea* of the lord the king, before the king himſelf be-
" ing, for that, to wit, That whereas the aforeſaid *Thomas*,
" on the firſt day of *March* in the eleventh year of the
" reign of our lord *William* the Third, now King of *Eng-*
" *land*, &c., at *Farringdon* in the county aforeſaid, was
" indebted to the aforeſaid *John* in his lifetime in one
" hundred ſhillings of lawful money of *England*, for di-
" vers goods, wares, and merchandizes of the ſame *John*
" by the beforeſaid *John* in his lifetime to the ſaid *Tho-*
" *mas*, at the eſpecial inſtance and requeſt of the ſame
" *Thomas*, before that time ſold and delivered: And being
[748] " ſo indebted the aforeſaid *Thomas* in conſideration thereof
" afterwards, to wit, the ſame day, year, and place above-
" ſaid, undertook, and then and there faithfully promiſed
" the ſaid *John* in his lifetime, that he the aforeſaid *Tho-*
" *mas* would well and truly pay and ſatisfy the ſaid one
Quantum meruit.
" hundred ſhillings to the ſaid *John*, when he ſhould be
" thereunto afterwards requeſted: And whereas alſo af-
" terwards, to wit, on the ſecond day of *March*, in the
" eleventh year aboveſaid, at *Farringdon* aforeſaid, in con-
" ſideration that the ſaid *John* in his lifetime, at the like
" inſtance and requeſt of the ſame *Thomas*, had ſold and
" delivered to the ſame *Thomas* divers other goods, wares,
" and merchandizes of him the ſaid *John*, the ſaid *Tho-*
" *mas* took upon himſelf, and then and there faithfully
" promiſed the ſame *John*, that he the aforeſaid *Thomas*
" would well and truly pay and ſatisfy the ſaid *John* ſo
" much money for the goods, wares, and merchandizes
" aforeſaid laſt mentioned, as thoſe goods, wares, and
" merchandizes, at the time of the ſelling and delivering
" thereof, were reaſonably worth, when he ſhould be af-
" terwards thereunto requeſted: And the ſaid *Daniel* in
" fact ſaith, that the goods, wares, and merchandizes
" aforeſaid laſt mentioned at the time of the ſale and de-
" livery thereof were reaſonably worth another hundred
" ſhillings

" ſhillings of like lawful money of *England*, to wit, at
" *Farringdon* aforeſaid; and thereof the ſame *Thomas* then
" and there had notice: Nevertheleſs the aforeſaid *Tho-* Breach.
" *mas* his aforeſaid promiſes and aſſumptions in form
" aforeſaid made not regarding, but contriving and fraud-
" ulently intending the ſame *John* in his lifetime, and the
" aforeſaid *Daniel* after the death of the ſaid *John*, in this
" behalf craftily and ſubtilly to deceive and defraud, hath
" not paid the ſeveral ſums of money aforeſaid to the ſaid
" *John* in his lifetime, or the aforeſaid *Daniel* after the
" death of the ſaid *John*, (to which ſaid *Daniel* adminiſ-
" tration of all and ſingular the goods and chattels, rights
" and credits, which were the aforeſaid *John*'s at the time
" of his death, was in due form committed by *Joſeph* Letters of adminiſtration committed.
" *Woodward*, doctor of laws, and archdeacon of the arch-
" deaconry of *Berks*, official lawfully appointed, after the
" death of the ſame *John*, to wit, on the tenth day of
" *April* in the year of our Lord one thouſand ſix hundred
" ninety and nine, at *Farringdon* aforeſaid, to which offi-
" cial the committing of the adminiſtration aforeſaid in
" this behalf did of right belong,) nor hath anywiſe con-
" tented them, or either of them, for the ſame; although
" to do this the aforeſaid *Thomas*, after the death of the
" ſaid *John*, and after the adminiſtration aforeſaid in form
" aforeſaid committed, to wit, on the twentieth day of Requeſt.
" *April* in the eleventh year aboveſaid, at *Farringdon*
" aforeſaid, by the aforeſaid *Daniel* was requeſted, but
" hath altogether refuſed to pay or anywiſe ſatisfy the
" ſame unto the ſaid *John* in his lifetime, and the afore-
" ſaid *Daniel* after the death of the ſaid *John*, and ſtill re-
" fuſes to pay or ſatisfy the ſame to the ſaid *Daniel*:
" Wherefore the ſaid *Daniel* ſaith, that he is injured, and
" hath damage to the value of ten pounds: And therefore
" he brings ſuit, *&c.*

" And the ſame *Daniel* brings here into Court the let- [749]
" ters of adminiſtration aforeſaid of the ſaid *Joſeph Wood-* Profert of the
" *ward*, which teſtify the commiſſion of the adminiſtra- letters of admi-
" tion aforeſaid in form aforeſaid, the date whereof is on niſtration.
" the day and year aboveſaid.

" And now at this day, to wit, *Wedneſday* next after Prays oyer of the
" fifteen days from the day of *Eaſter* in this ſame term, letters of admi-
" until which day the aforeſaid *Thomas Cox* had leave to niſtration.
" imparle to the aforeſaid bill, and then to anſwer, *&c.*
" before the lord the king at *Weſtminſter* comes as well the
" aforeſaid *Daniel Hillyard* by his ſaid attorney, as the
" aforeſaid *Thomas Cox* by *Edward Serle* his attorney:
" And the ſame *Thomas* defends the force and injury,
" when, *&c.* and prays *oyer* of the aforeſaid letters of ad-
" miniſtration now here produced in Court, and in the

" declaration aforeſaid above ſpecified; and they are read " to him in theſe words, to wit, *Joſeph Woodward*, doctor " of laws and archdeacon of the archdeaconry of *Berk-* " *ſhire*, official lawfully conſtituted, to our beloved in " Chriſt *Daniel Hillyard* clerk, principal creditor of *John* " *Cox*, when living, of *Newbery* within the county and " archdeaconry of *Berks* aforeſaid, *grocer*, lately deceaſed, " greeting in the Lord: Whereas the ſaid *John Cox*, ſo " as aforeſaid deceaſed, lately died inteſtate, We there- " fore deſiring that the goods, rights, and credits of the " ſaid deceaſed be well and faithfully adminiſtered and " converted, and diſpoſed to be adminiſtered to pious " uſes; Therefore for the well and faithfully diſpoſing " of the goods, rights, and credits of the aforeſaid de- " ceaſed, and alſo for demanding, collecting, levying, and " requiring all credits whatſoever of the ſaid deceaſed, " and which belonged to the ſaid deceaſed whilſt he " lived, and at the time of his death, and for the pay- " ment of what the ſaid deceaſed at ſuch time of his " death was indebted, as far as ſuch goods, rights, and " credits extend, according to the value thereof; it is " permitted you, in whoſe fidelity we do in this behalf " confide, being ſworn in due form of law upon GOD's " Holy Evangeliſts, well and faithfully to adminiſter the " ſame, and to make a full and faithful inventory of all " and ſingular the goods, rights, and credits of the ſaid " deceaſed; and to exhibit the ſame into the regiſtry of the " ſaid archdeacon of *Berks* aforeſaid, on or before the firſt " day of the month of *June* next enſuing, and alſo to ren- " der thereof a full and true account, calculation, or eſti- " mation of and concerning your addition on or before " the firſt day of *March*, which ſhall be in the year of " our Lord one thouſand ſix hundred and ninety and nine: " By the tenor of theſe preſents we commit full power, " and ordain, depute, and conſtitute you by theſe pre- " ſents, adminiſtrator of all and ſingular the goods, rights, " and credits of the ſaid deceaſed *Anne Cox*, widow and " relict of the ſame deceaſed, having firſt renounced in " writing the adminiſtration of the goods, &c. Dated " at *Oxford* under the ſeal of our office, on the aforeſaid " tenth day of *April* in the year of our Lord one thouſand " ſix hundred and ninety and nine.

[750]

Pleads that the inteſtate at the time of his death lived in another diocese.

" Which being read and heard, the ſame *Thomas* ſaith, " that the aforeſaid *Daniel* his ſaid action thereupon " againſt him ought not to have or maintain, becauſe he " ſaith that the aforeſaid *Thomas*, at the time of the death " of the ſaid *John Cox*, and at the time of the commit- " ting the adminiſtration aforeſaid, and long before, was " an inhabitant and reſiant in the city of *Oxford* in the " county

" county of *Oxford*, which ſaid city is and always was
" within the dioceſe of *Oxford*, and out of the arch-
" deaconry of *Berkſhire* aforeſaid, and the juriſdiction of
" the archdeacon of that archdeaconry, which ſaid arch-
" deaconry and the whole county of *Berkſhire* aforeſaid
" are and always were within the dioceſe of *Saliſbury*, and
" not within the dioceſe of *Oxford*; by which the com-
" mitting of adminiſtration of all and ſingular the goods
" and chattels, rights and credits, which were the ſaid
" *John Cox*'s at the time of his death, of right belonged
" to *Thomas* by Divine Providence then and ſtill arch-
" biſhop of *Canterbury*, by reaſon of his prerogative, and
" not to the aforeſaid archdeacon of the archdeaconry of
" *Berks*, or any other inferior judge; and the ſaid letters
" of adminiſtration produced here in court are void and of
" no effect in law: And this he is ready to verify: Where-
" fore he prays judgment if the aforeſaid *Daniel* ought to
" have or maintain his ſaid action thereupon againſt him,
" *&c.*

" And the aforeſaid *Daniel Hillyard* ſaith, that he, not- Demurrer with
" withſtanding any matters by the aforeſaid *Thomas Cox* ſpecial cauſes.
" above in pleading alleged, ought not to be precluded
" from having his ſaid action thereupon againſt the ſame
" *Thomas*, becauſe he ſaith that the plea aforeſaid by him
" the ſame *Thomas*, in manner and form aforeſaid above
" pleaded, and the matter in the ſame contained, are not
" ſufficient in law to preclude him the ſaid *Daniel* from
" having his ſaid action thereupon againſt the ſaid *Tho-*
" *mas*: To which ſaid plea in manner and form aforeſaid
" above pleaded, he the ſame *Daniel* need not, nor is
" bound by the law of the land in any manner to anſwer:
" And this he is ready to verify: Wherefore, for want of
" a ſufficient plea in this behalf, the ſame *Daniel* prays
" judgment, and his damages by occaſion of the premiſes
" to be to him adjudged, *&c.* And for cauſes of demurrer
" in law, according to the form of the ſtatute in ſuch caſe
" made and provided, the ſaid *Daniel* ſhews and demon-
" ſtrates to the Court here theſe cauſes following, to wit,
" for that it doth not appear by the plea aforeſaid, that
" the aforeſaid *Thomas Cox* was not an inhabitant within
" the dioceſe of the biſhop of *Saliſbury* at the time of the
" death of the aforeſaid *John Cox*; and that the ſaid plea
" is uncertain and wants form, *&c.*

" And the aforeſaid *Thomas Cox* ſaith, that the plea Joinder.
" aforeſaid by him the ſaid *Thomas* in manner and form
" aforeſaid above pleaded, and the matter in the ſame
" contained, are good and ſufficient in law to preclude him
" the ſaid *Daniel* from having his ſaid action thereupon
" againſt him the ſaid *Thomas*, which ſaid plea, and the

" matter in the ſame contained, the ſame *Thomas* is ready " to verify and prove as the Court, *&c.* And becauſe " the ſaid *Daniel* hath not anſwered to that plea, nor hath " hitherto in anywiſe contradicted it, the ſaid *Thomas*, as " before, prays judgment, and that the aforeſaid *Daniel* be " precluded from having his action aforeſaid thereupon " againſt the ſaid *Thomas*, *&c.* But becauſe the Court of " the ſaid lord the king now here are not yet determined " of giving their judgment of and upon the premiſes, a day " is therefore given to the parties aforeſaid before the lord " the king at *Weſtminſter*, until —— day next after —— " of hearing their judgment thereon, for that the Court of " the ſaid lord the king now here thereof not yet," *&c.*

Pleas before our Lord the King at Weſtminſter, *of the Term of the* Holy Trinity *in the Twelfth Year of the Reign of our Lord* William *the Third, now King of* England, *&c. Roll* 369.

Gidley *againſt* Williams.

Salk. 37. Caſes B. R. 443.

Cornwall, " BE it remembered, That heretofore, to wit, " wit, in the term of *Eaſter* laſt paſt, be- " fore the lord the king at *Weſtminſter* came *Thomaſin* " *Gidley* widow, adminiſtratrix of all the goods and chat- " tels of *Richard* her huſband lately deceaſed, by *Peter* " *Champion* her attorney, and brought into the Court of " the ſaid lord the king then there her certain bill againſt " *Petherick Williams*, otherwiſe called *Petherick Booth*, of " the pariſh of *Withiel* in the county of *Cornwall*, yeo- " man, in the cuſtody of the marſhal, *&c.*, of a plea of " debt; and there are pledges of proſecuting, namely, " *John Doe* and *Richard Roe*; which ſaid bill followeth " in theſe words, that is to ſay, *Cornwall*, to wit, *Tho-* " *maſin Gidley*, widow and adminiſtratrix of all the goods " and chattels of *Richard Gidley* her huſband lately de- " ceaſed, complains of *Petherick Williams*, otherwiſe called " *Petherick Booth*, of the pariſh of *Withiel* in the county of " *Cornwall*, yeoman, in the cuſtody of the marſhal of the " *Marſhalſea* of our lord the king, before the king himſelf " being, of a plea, that he render to her twenty pounds of " lawful money of *England*, which he oweth to her, and " unjuſtly detains, for that, to wit, That whereas the " aforeſaid

Declaration by an adminiſtratrix upon a bill obligatory to the inteſtate.

" aforeſaid *Petherick*, on the tenth day of *June* in the year " one thouſand ſix hundred and eighty-five, at *Great St.* " *Collumbe* in the county aforeſaid, by his certain bill ob- " ligatory, ſealed with the ſeal of him the ſaid *Petherick*, " and ſhewn to the Court of the ſaid lord the king now " here, the date of which is the ſame day and year, ac- " knowledgeth himſelf to owe and be indebted to the " ſame *Richard Gidley* in his lifetime, in the entire ſum of " ten pounds of good and lawful money of *England*, to be " paid to the ſame *Richard* in his lifetime, his executors, " adminiſtrators, or aſſigns, at or upon the tenth day of " *December* next following the date of the aforeſaid bill " obligatory, and for the true payment thereof bound " himſelf, his executors and adminiſtrators, in the full ſum " of twenty pounds of lawful *Engliſh* money; and the ſaid " *Thomaſin* in fact ſaith, that the aforeſaid *Petherick* did " not pay to the ſame *Richard* in his lifetime the aforeſaid " ſum of ten pounds, at or upon the tenth day of *Decem-* " *ber* next following the date of the bill obligatory afore- " ſaid, which he ought to have paid to the ſaid *Richard* " upon the ſame day, according to the form and effect of " the bill obligatory aforeſaid: Whereby an action hath " accrued to the ſame *Richard* in his lifetime, and to the " ſaid *Thomaſin* after the death of the ſaid *Richard*, to re- " quire and have of the aforeſaid *Petherick* the aforeſaid " ſum of twenty pounds: Nevertheleſs the aforeſaid *Pe-* " *therick*, although often requeſted, *&c.*, hath hitherto " altogether refuſed to pay the beforeſaid twenty pounds " to the ſaid *Richard* in his lifetime, or to the ſame *Tho-* " *maſin* after the death of the ſaid *Richard*, and ſtill re- " fuſeth to pay the ſame to the ſaid *Thomaſin*, to the da- " mage of the ſaid *Thomaſin* of twenty and five pounds: " And therefore ſhe brings ſuit, *&c.* And the aforeſaid " *Thomaſin* brings here into court the aforeſaid letters of " adminiſtration of the aforeſaid *Richard*, whereby it ſuf- " ficiently appears to the Court here, that the aforeſaid " *Thomaſin* is the adminiſtratrix of the aforeſaid *Richard*, " and thereupon hath adminiſtration, *&c.*

N. B. Defendant not having demurred, the bringing this action is the debet and detinet is cured by the verdict. 1 Sid. 342, 379. Show. 57.

The granting letters of adminiſtration ought to have been inſerted here.

" And now at this day, to wit, *Friday* next after the " morrow of the *Holy Trinity* in this ſame term, to which " day the aforeſaid *Petherick* had leave to imparle to the " ſaid bill, and then to anſwer, *&c.* before the lord the " king at *Weſtminſter*, comes as well the aforeſaid *Thoma-* " *ſin* by her ſaid attorney; and the ſame *Petherick*, by " *Joſeph Hawkey* his attorney; and the ſame *Petherick* de- " fends the force and injury, when, *&c.*, and ſaith that he " ought not to be charged with the debt aforeſaid by vir- " tue of the ſaid bill obligatory, becauſe he ſaith that the " aforeſaid

Imparlance.

" aforeſaid bill is not his deed: And of this he puts him-
" ſelf upon the country; and the aforeſaid *Thomaſin* in
" like manner, *&c.*

" Therefore let a jury come thereupon before the lord
" the king at *Weſtminſter*, on *Wedneſday* next after three
" weeks from the day of the *Holy Trinity*; and who nei-
" ther, *&c.* to recognize, *&c.*, becauſe as well, *&c.* The
[753] " ſame day is to the parties aforeſaid there, *&c.* After-
Poſtea continued. " wards the proceedings are thence continued between the
" aforeſaid parties of the plea aforeſaid, by the jury re-
" ſpited thereupon between them, before the lord the king
" at *Weſtminſter*, until *Wedneſday* next after three weeks
" from the day of the *Holy Trinity* then next following,
" unleſs the juſtices of the lord the king appointed to take
" the aſſizes in the county aforeſaid firſt come on the
" ninth day of *Auguſt* at *Launceſton* in the county afore-
" ſaid, by form of the ſtatute, *&c.*, for default of jurors,
" *&c.* At which day, before the lord the king at *Weſt-*
" *minſter*, comes the aforeſaid *Thomaſin* by her ſaid attor-
" ney; and the beforeſaid juſtices of the lord the king,
" before whom, *&c.* ſent here their record had before
" them in theſe words: Afterwards, at the day and place
Return of the poſtea. " within mentioned, before Sir *John Powell*, Knt., one of
" the juſtices of our lord the king of the bench of our ſaid
" lord the king appointed to take the aſſizes in the county
" of *Cornwall*, and *Francis Swanton* Eſq., aſſociate to the
" ſame *John Powell*, for this turn, by the form of the ſta-
" tute, *&c.*, came the within-named *Thomaſin Gidley*, wi-
" dow, by her attorney within mentioned; and the with-
" in-named *Petherick Williams*, although ſolemnly re-
Default. " quired, did not come, but made default: Therefore let
" the jury, whereof mention is within made, be taken
Verdict for the plaintiff. " againſt him by default. And the jurors of that jury be-
" ing ſummoned came, who being elected, tried, and
" ſworn to ſpeak the truth of the within contents, upon
" their oath ſay, that the bill obligatory within mentioned
" is the deed of the aforeſaid *Petherick Williams*, as the
" aforeſaid *Thomaſin* hath within againſt him declared,
" and aſſeſs the damages of the ſaid *Thomaſin*, by occaſion
" of the detention of the within-written debt, over and
" above her coſts and charges by her about her ſuit in
" this behalf applied, to two-pence, and for thoſe coſts
" and charges to forty ſhillings: Therefore it is conſider-
" ed, that the aforeſaid *Thomaſin* do recover againſt the
" aforeſaid *Petherick* her ſaid debt and the damages afore-
" ſaid by the jury in form aforeſaid aſſeſſed; and alſo
" thirteen pounds and ten ſhillings for her coſts and
" charges by the Court of the ſaid lord the king now here
" adjudged

" adjudged to the ſaid *Thomaſin*, by her aſſent, of increaſe:
" Which ſaid damages in the whole amount to fifteen
" pounds ten ſhillings and two-pence; and that the ſaid
" *Petherick* be taken," &c.

Pleas before our Lady the Queen at Weſtminſter, *of the Term of the* Holy Trinity *in the Third Year of the Reign of the Lady* Anne, *now Queen of* England, &c. *Roll* 90. [754]

Slater *againſt* May.

London, to wit, " BE it remembered, That heretofore, to wit, in the term of *Eaſter* laſt paſt, before the " lady the queen at *Weſtminſter* came *John Slater*, adminiſtrator of all and ſingular the goods, rights, and credits which were *Chriſtopher Youlden*'s deceaſed at the time " of his death, by *Thomas Moore* his attorney, and brought " into the court of the ſaid lady the queen then there his " certain bill againſt *John May* in the cuſtody of the " marſhal, &c., of a plea of treſpaſs upon the caſe; " and there are pledges of proſecuting, namely, *John* " *Doe* and *Richard Roe*; which ſaid bill followeth in " theſe words, that is to ſay, *London*, to wit, *John Slater*, " adminiſtrator of all and ſingular the goods, rights, and " credits which were *Chriſtopher Youlden*'s deceaſed, at " the time of his death, complains of *John May*, in the " cuſtody of the marſhal of the *Marſhalſea* of the " lady the queen, before the queen herſelf being, for " that, to wit, That whereas the aforeſaid *John May*, on " the twenty-third day of *January* in the year of our " Lord one thouſand ſix hundred ninety and nine, at " *London*, to wit, in the pariſh of St. *Mary le Bow* in the " ward of *Cheap*, was indebted to the ſaid *Chriſtopher* in " his lifetime in thirty pounds of lawful money of *Eng-* " *land*, for ſo much money of the ſame *Chriſtopher* in his " lifetime, by him the ſaid *Chriſtopher* in his lifetime to " the ſaid *John May*, at the ſpecial inſtance and requeſt " of him the ſaid *John May*, before that time lent and " accommodated; and being ſo thereupon indebted, he " the ſaid *John May*, in conſideration thereof, afterwards, " to wit, the ſame day and year aboveſaid, at *London* " aforeſaid in the pariſh and ward aforeſaid, took upon " himſelf, and then and there faithfully promiſed the ſaid " *Chriſtopher*

3 D. 351. p. 4. 6 Mod. 304. 3 Salk. 23. Salk. 42.

Declaration by an adminiſtrator during the abſence of the executor, for money lent by the inteſtate.

Indebitatus aſſumpſit.

" *Chriſtopher* in his lifetime, that he the ſaid *John May*
" would well and faithfully ſatisfy and pay the aforeſaid
" thirty pounds to the ſame *Chriſtopher*, when afterwards
" he ſhould be thereunto requeſted: And whereas alſo
" the aforeſaid *John May* afterwards, to wit, the ſame
" day and year aboveſaid, at *London* aforeſaid in the pa-
" riſh and ward aforeſaid, was indebted to the ſaid
" *Chriſtopher* in his lifetime in other thirty pounds of like
[755] " lawful money of *England*, for ſo much money of him
Another indebitat. aſſump. for money had and received to the inteſtate's uſe. " the ſaid *Chriſtopher* in his lifetime, by the ſaid *John*
" *May* for the ſame *Chriſtopher*, and to the uſe of him the
" ſaid *Chriſtopher*, before that time had and received;
" and being ſo indebted, the aforeſaid *John May* after-
" wards, to wit, the ſame day and year aboveſaid, at
" *London* aforeſaid, in the pariſh and ward aforeſaid, in
" conſideration thereof, took upon himſelf and then and
" there faithfully promiſed the ſame *Chriſtopher* in his
" lifetime, that he the ſaid *John May* would well and
" truly pay and ſatisfy the ſaid thirty pounds laſt men-
" tioned to the ſaid *Chriſtopher*, when he ſhould be there-
Breach. " unto afterwards requeſted: Nevertheleſs the ſaid *John*
" *May* his ſeveral promiſes and undertakings aforeſaid in
" form aforeſaid made not regarding, but contriving and
" fraudulently intending in this behalf craftily and ſub-
" tilly to deceive and defraud the ſaid *Chriſtopher* in his
" lifetime, and the ſaid *John Slater* after the death of the
" ſaid *Chriſtopher*, of the ſaid ſeveral ſums of money (to
Letters of adminiſtration ſet forth. " which ſaid *John Slater* adminiſtration of all and ſingu-
" lar the goods, rights, and credits which were the afore-
" ſaid *Chriſtopher Youlden*'s at the time of his death, with
" his will annexed, for the uſe and benefit and during
" the abſence of *Elizabeth Vittery*, the executrix named
" in the ſaid will, by *Thomas* by Divine Providence arch-
" biſhop of *Canterbury*, primate and metropolitan of all
" *England*, on the fifteenth day of *October* in the year of
" our Lord one thouſand ſeven hundred and three, at
" *London* aforeſaid in the pariſh and ward aforeſaid were
" in due form of law committed) hath not paid the ſaid
" ſeveral ſums of money, or any part thereof, to the ſaid
" *Chriſtopher* in his lifetime, or to the ſaid *John Slater*
" after the death of him the ſaid *Chriſtopher*, nor hath
" hitherto in any manner contented them for the ſame
Requeſt. " (although to do this the aforeſaid *John May* by the ſaid
" *Chriſtopher* in his lifetime, and by the ſaid *John Slater*
" after the death of the ſaid *Chriſtopher*, and the com-
" mitting of the adminiſtration aforeſaid at *London* afore-
" ſaid in the pariſh and ward aforeſaid was requeſted);
" but altogether refuſed to pay or in any manner to ſa-
" tisfy the ſame unto the ſaid *Chriſtopher* in his lifetime,

" and

" and yet refuſeth to pay them to the ſaid *John Slater*,
" to the damage of him the ſaid *John Slater* of forty
" pounds: And thereupon he brings ſuit, &c. And the
" ſaid *John Slater* brings here into Court the ſaid letters
" of adminiſtration aforeſaid of the ſaid archbiſhop,
" which teſtify the commiſſion of the adminiſtration
" aforeſaid to the ſaid *John Slater* in form aforeſaid, the
" date whereof is the ſame day and year in that behalf
" abovementioned, &c.

" And now at this day, to wit, *Friday* next after the
" morrow of the *Holy Trinity* in this ſame term, until
" which day the ſaid *John May* had leave to imparle to
" the aforeſaid bill, and then to anſwer, &c. before the
" lady the queen at *Weſtminſter* comes as well the ſaid
" *John Slater* by his ſaid attorney, as the ſaid *John May*
" by *Richard Gates* his attorney: And the ſame *John*
" *May* defends the force and injury, when, &c. and ſaith
" that the declaration aforeſaid, and the matter therein Demurrer to the
" contained, are not ſufficient in the law for the ſaid declaration.
" *John Slater* to have and maintain his ſaid action there- [756]
" upon againſt him the ſaid *John May*; and that he hath
" no need, nor is bound by the law of the land in any
" manner to anſwer the ſaid declaration in manner afore-
" ſaid declared: And this he is ready to verify: Where-
" fore for defect of a ſufficient declaration in this behalf,
" the ſaid *John May* prays judgment, if the ſaid *John*
" *Slater* ought to have this ſaid action againſt him the
" ſaid *John May*, &c. And for cauſes of demurrer in Joinder.
" law in this behalf, the ſame *John May*, according to
" the form of the ſtatute in ſuch caſe lately made and
" provided, ſheweth and pointeth out to the Court here
" theſe cauſes following, to wit, That the declaration
" aforeſaid is altogether uncertain, double inſenſible, in-
" ſufficient in law, and wants form, &c. And the afore-
" ſaid *John Slater* ſaith, that notwithſtanding any thing
" by the ſaid *John May* above alleged, the declaration
" aforeſaid of the ſaid *John Slater* ought not to be quaſh-
" ed, becauſe he ſaith that the declaration aforeſaid, and
" the matter in the ſame contained, are good and ſuffi-
" cient in the law for him the ſaid *John Slater* to have
" and maintain his ſaid action thereon againſt him the
" ſaid *John May*: Which ſaid declaration and the mat-
" ter in the ſame contained the ſaid *John Slater* is ready
" to verify and prove as the Court, &c. And becauſe
" the aforeſaid *John May* hath not anſwered to that de-
" claration, nor hath hitherto anywiſe contradicted it,
" the ſaid *John Slater* prays judgment and his damages by
" occaſion of the premiſes to him to be adjudged, &c.

" But

" But becauſe the Court of our ſaid lady the queen " now here are not yet determined of giving their judg- " ment of and concerning the premiſes aforeſaid, a day " therefore is given to the aforeſaid parties before the " lady the queen at *Weſtminſter*, until —— day next " after —— of hearing their judgment of and concern- " ing the ſaid premiſes, for that the Court of the ſaid " lady the queen here thereof are not yet," &c.

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[757] *Pleas before the Lord the King at* Weſtminſter, *of the Term of* St. Michael *in the Eleventh Year of the Reign of the Lord* William *the Third, now King of* England, &c. *Roll* 377.

The Biſhop of Saliſbury *againſt* Phillips.

[3 Ld. Raym. Entries 451. S. C.]

Salk. 43. Carth. 505. Holt 52. S. C.

" THE lord the king hath given in charge to his be- " loved and faithful Sir *George Treby*, Knt. his Chief " Juſtice of the Bench, his writ cloſed in theſe words, to " wit, *William* the Third, by the grace of GOD, of " *England*, *Scotland*, *France*, and *Ireland* King, Defender " of the Faith, &c. To his beloved and faithful Sir " *George Treby*, Knt. his Chief Juſtice of the Bench,

Writ of error.

" greeting: Becauſe in the record and proceedings, and " alſo in the giving of the judgment of the complaint " which was in our Court before you and your brethren " our juſtices of the Bench aforeſaid, by our writ be- " tween *William Phillips*, executor of the will of *William* " *Phillips*, Gentleman, his father lately deceaſed, and " *Gilbert* biſhop of *Saliſbury* and *John Berrow* clerk, to " the end that the ſame biſhop and *John* ſhould permit " him the ſaid *William Phillips*, the now plaintiff, to pre- " ſent a fit perſon to the church of *Stanton*, otherwiſe " *Stanton Fitz-Warren*, otherwiſe *Stanton Fitz-Herbert*, in " the county of *Wilts*, which was vacant, and did belong " to his gift, as it was ſaid, manifeſt error intervened, to " the great damage of them the ſaid biſhop and *John*, " as we have been informed from his complaint, We " being willing that the error (if any was) ſhould be in " due manner corrected, and that full and ſpeedy juſtice

" ſhould

" ſhould be done to them the ſaid biſhop and *John*, in " this behalf, do command you, that if judgment be " thereupon given, then that you diſtinctly and plainly " ſend the record and proceedings aforeſaid with all " things to them belonging, unto us under your ſeal, and " this writ; ſo that we may have them from the day of " *Eaſter* in five weeks whereſoever we ſhall then be in " *England*, that we having inſpected the record and pro- " ceedings aforeſaid, may cauſe to be done that which of " right and according to the law and cuſtom of our king- " dom of *England* is moſt fit to be done further there- " upon for correcting the error. Witneſs our ſelf at " *Weſtminſter* the twenty-ſixth day of *April* in the eleventh " year of our reign.

Hale.

" The anſwer of Sir *Geo. Treby*, Knt. Chief Juſtice [758]
" within named.

" The record and proceedings of the complaint where- " of mention is within made, with all things concerning " the ſame, before the lord the king, whereſoever, *&c.* " at the day within mentioned, I ſend in a certain record " to this writ annexed, as within I am commanded.

Geo. Treby.

" Pleas inrolled at *Weſtminſter* before Sir *George Treby*, " Knt. and his brethren, juſtices of our lord the king, " of the Bench, of the term of the *Holy Trinity* in the " tenth year of the reign of our lord *William* the Third, " by the grace of God, of *England*, *Scotland*, *France*, and " *Ireland* King, Defender of the Faith, *&c.* *Roll* 1562.

" *Wilts*, to wit, *Gilbert*, biſhop of *Saliſbury*, and *John* Quare impedit. by the executor of William Phillips.
" *Berrow*, clerk, were ſummoned to anſwer *William Phil-* " *lips*, Gent. executor of the laſt will and teſtament of " *William Phillips*, Gent. his father lately deceaſed, of " a plea, that they permit him the ſaid *William Phillips*, " now plaintiff, to preſent a fit perſon to the church of " *Stanton*, otherwiſe *Stanton Fitz-Warren*, otherwiſe *Stan-* " *ton Fitz-Herbert*, which is vacant [or void] and belongs " to his gift, *&c.* And whereupon the ſame *William* Declares upon an agreement by indenture between jointenants to preſent by turns.
" *Phillips*, now plaintiff, by *Dennis Ruſſell* his attorney " ſaith, That whereas one *Richard Organ* and one *John* " *Organ* were ſeiſed as of fee and right of the advowſon " of the aforeſaid church in groſs, and being thereof ſo " ſeiſed, the aforeſaid *Richard Organ* and *John Organ* on " the twenty-ſixth day of *June* in the thirteenth year of " the reign of *James* the Firſt, late king of *England*, at " *Stanton* aforeſaid in the county aforeſaid, by their cer-

" tain

" tain indenture made between the ſaid *Richard Organ*
" by the name of *Richard Organ* of *Lambourn* in the county
" of *Berks*, Gent. of the one part, and the ſaid *John*
" *Organ*, by the name of *John Organ* of *Stanton* within
" the hundred of *Highworth* in the county of *Wilts*, Gent.
" of the other part, the other part whereof, ſealed with
" the ſeal of the ſaid *John Organ*, the ſame *William Phil-*
Profert of the indenture. " *lips* now plaintiff brings here into Court, the date
" whereof is on the ſame day and year concluded and
" agreed between themſelves, that they the ſaid *Richard*
" *Organ* and *John Organ* ſhould be thereupon ſeiſed in
" common, not jointly, of the advowſon of the church
" aforeſaid, that is to ſay, that the ſaid *Richard Organ*
" ſhould ſtand and be ſeiſed, and have, hold, and enjoy
" one moiety of the ſaid advowſon to him and his heirs,
" and that the ſaid *John Organ* ſhould ſtand and be ſeiſed,
" and have, hold, and enjoy the other moiety of the ſaid
" advowſon to him and his heirs; and that the ſaid
" *Richard Organ* and *John Organ* and their ſeveral heirs,
" ſo often as the ſaid church of *Stanton* ſhould become
" vacant [or void] ſeverally and reſpectively ſhould pre-
" ſent by ſeveral turns one after another in manner and
" form following, to wit, that the ſaid *Richard Organ* and
" his heirs might preſent to the ſaid church at the firſt
[759] " turn when the ſaid church ſhould happen firſt and next
" to be vacant [or void] for it; and that the ſaid *John*
" *Organ* and his heirs might preſent to the ſaid church
" when the ſame ſhould then next be vacant [or void]
" the ſecond time; and ſo the ſaid *Richard Organ*
" and *John Organ* ſeverally and their ſeveral and re-
" ſpective heirs, in their ſeveral turns alternately, as
" the ſame church at any time thereafter ſhould be-
" come vacant [or void] ſhould or might preſent their
" clerks according to the order and courſe concluded
" and agreed upon as before is mentioned, as by the
" ſame indenture amongſt other things more fully ap-
" pears; whereby the ſame *Richard* and *John* were
" ſeiſed of the advowſon aforeſaid to be preſented to the
First preſentation. " ſame church in form aforeſaid; and being ſo ſeiſed
" thereof, the ſaid *Richard Organ*, after the making of the
" ſaid indenture, beginning his firſt turn, and as in his
" firſt turn at *Stanton* aforeſaid, preſented to the ſaid
" church, being vacant, one *John Woodbridge* his clerk,
" who at the preſentation of the ſame *Richard Organ* was
" there admitted and inſtituted in the ſame, in time of
" peace, in the time of our lord *James* the Firſt, late
Vacancy by death. Second preſentment. " King of *England*. And afterwards the church aforeſaid
" became vacant by the death of the ſaid *John Woodbridge*
" there, whereby the ſaid *John* preſented to the ſame
" church

" church ſo vacant [or void] as in the ſecond turn, at
" *Stanton* aforeſaid, *Thomas Hotchkis* his clerk, who at the
" preſentation of him the ſaid *John Organ* was admitted
" and inſtituted in the ſame, in time of peace, in the
" time of our lord *Charles* the Firſt, late King of *Eng-*
" *land*; and the aforeſaid *Richard Organ* and *John Organ*
" being ſo ſeiſed of the advowſon aforeſaid, the ſaid
" *Richard Organ* afterwards, at *Stanton* aforeſaid, died
" ſeiſed of ſuch his eſtate, by and after whoſe death a
" moiety of the advowſon aforeſaid deſcended to one Deſcent of one
" *John Organ* as brother and heir of the ſaid *Richard* moiety.
" *Organ*, whereby the ſame *John Organ* the brother was
" ſeiſed of the moiety of the advowſon aforeſaid as of
" fee and right to preſent in form aforeſaid; and being
" ſo ſeiſed thereof, afterwards, to wit, on the twenty-fifth
" day of *Auguſt* in the fourteenth year of the reign of
" the ſaid late king *Charles* the Firſt, by a certain inden- Another agree-
" ture made between him the ſaid *John Organ* of the ment by indenture.
" one part, and one *Richard Hippeſley* of *Stone Eaſton* in
" the county of *Somerſet*, Gentleman, nephew of the ſaid
" *John Organ* the brother, to wit, ſecond ſon of *Eliza-*
" *beth Hippeſley* widow, natural ſiſter of the ſaid *John*
" *Organ* the brother, of the other part, made at *Stanton*
" aforeſaid, in the county aforeſaid, the other part where-
" of, ſealed with the ſeal of the ſaid *John Organ* the
" brother, the ſame *William Phillips* the now plaintiff
" produces here in Court, the date whereof is the ſame
" day and year laſt aboveſaid; and in conſideration of the Conſideration.
" natural love and affection which he had and bore to-
" wards the ſaid *Richard Hippeſley*, and in conſideration
" of the blood between them, and for the better preſer-
" ment, advancement, maintenance, and livelihood of
" the ſaid *Richard Hippeſley* and his brother, in the ſame
" indenture afterwards named, he the ſaid *John Organ*
" the brother, for himſelf and his heirs, covenanted, [760]
" granted, and agreed to and with the ſaid *Richard Hip-*
" *peſley* and his heirs, that he the ſaid *John Organ*
" the brother, his heirs and aſſigns, and every of them,
" and all and every other perſon and perſons and their
" heirs, who then were or thereafter ſhould ſtand and be
" ſeiſed of and in the ſaid moiety of the advowſon afore-
" ſaid, ſhould ſtand and be ſeiſed of the ſame, to the uſe Settled in tail to
" and behoof of the ſaid *Richard Hippeſley*, and the heirs the uſes declared.
" of the body of the ſaid *Richard Hippeſley* lawfully to
" be begotten; and for want of ſuch iſſue, to the uſe
" and behoof of *Robert Hippeſley*, brother of the ſaid
" *Richard Hippeſley*, and the heirs of the body of the ſaid
" *Robert Hippeſley*, lawfully to be begotten; and for de-
" fault of ſuch iſſue, to the uſe and behoof of the ſaid
" *John Organ* the brother, and his heirs and aſſigns for

" ever; and to no other uſes, intents, or purpoſes what-
" ſoever, as by the ſaid indenture laſt mentioned more
" fully appears; by virtue of which ſaid indenture, and
" by force of a certain act, made and provided in the
" parliament of our lord *Henry* the Eighth, late King of
" *England*, held at *Weſtminſter* in the county of *Middle-*
" *ſex* on the fourth day of *February* in the twenty-ſeventh
" year of his reign, of transferring uſes into poſſeſſion,
" the aforeſaid *Richard Hippeſley* was ſeiſed of a moiety
" of the advowſon aforeſaid, as of fee tail and right
" belonging to the remainder thereof in form aforeſaid,
" to wit, to preſent in form aforeſaid; and the ſaid
" *Richard Hippeſley* being ſo ſeiſed thereof, afterwards,
" at *Stanton* aforeſaid, in the county aforeſaid, died, by
" and after whoſe death the ſaid moiety of the advow-
" ſon aforeſaid deſcended to *Richard Hippeſley*, Eſq. as ſon
" and heir of the body of the ſaid *Richard Hippeſley*,
" whereby the ſame *Richard Hippeſley* the ſon was ſeiſed
" of the ſaid moiety of the advowſon aforeſaid as of fee-
" tail and right: And the ſame *Richard Hippeſley* the
" ſon being ſo ſeiſed thereof, afterwards, at *Stanton* afore-
" ſaid, died without iſſue of his body, by and after whoſe
" death the ſaid moiety of the advowſon aforeſaid de-
" ſcended to *John Hippeſley*, Eſq. as ſon and heir of the
" body of the ſaid *Richard Hippeſley* firſt named, whereby
" the ſaid *John Hippeſley* was ſeiſed of the ſaid moiety of
" the advowſon aforeſaid as of fee and right. And the
" ſaid *John Hippeſley* being ſo thereof ſeiſed, afterwards, to
" wit, the ſixteenth day of *January*, in the twenty-fourth
" year of the reign of our lord *Charles* the Second, late
" King of *England*, at *Stanton* aforeſaid, in the county
" aforeſaid, by his certain writing, which the ſame *Wil-*
" *liam Phillips* the now plaintiff produces here in court,
" ſealed with the ſeal of the ſaid *John Hippeſley*, the date
Grant of the next avoidance to the teſtator and Fr. Symes, their executors and aſſigns.
" of which is the ſame day and year, did give and grant
" to *Francis Symes* the elder of *Kelmeſcot* in the county of
" *Oxford*, Gentleman, and *William Phillips* the teſtator of
" *Eaton Haſtings* in the county of *Berks*, Gentleman, his
" executors and aſſignees, the firſt and next advowſon,
" donation, nomination, preſentation, and free diſpoſition
" of the ſaid pariſh church of *Stanton*, otherwiſe called
[761] " *Stanton Fitzherbert*, otherwiſe *Stanton Fitzwarren*, will-
" ing, and by his ſame writing granting, that it ſhould and
" might be lawful to and for the ſaid *Francis Symes* and
" *William Phillips* the teſtator, their executors and aſſig-
" nees, to preſent to the ſaid church of *Stanton Fitzherbert*,
" otherwiſe *Stanton Fitzwarren*, whenſoever or howſoever
" by death, reſignation, deprivation, ceſſion, permutation,
" diſmiſſion, or any other way whatſoever, by which the
" ſame church ſhould happen then firſt and next to be va-

" cant

" cant [or void] any honeſt and learned clerk for the then
" next turn only, as by the writing aforeſaid more fully
" appears; by virtue of which grant the ſame *Francis*
" *Symes* and *William Phillips* the teſtator were poſſeſſed
" of the advowſon of the church of *Stanton* aforeſaid;
" that is to ſay, to preſent to the ſame church, when firſt
" and next it ſhould happen to be vacant; and being ſo
" poſſeſſed thereof, the ſaid *Francis Symes*, afterwards, at
" *Stanton* aforeſaid, in the county aforeſaid, died, and the
" ſaid *William Phillips* the teſtator ſurvived, and then was
" poſſeſſed of the advowſon aforeſaid by right of *ſurvivor-*
" *ſhip*, &c. And the ſaid *William Phillips* the teſtator
" being ſo thereof poſſeſſed, the ſaid church in the life-
" time of the ſaid *William Phillips* the teſtator was va-
" cant [or void] by the death of the ſaid *Thomas Hotchkis*,
" and ſtill remains vacant [or void]; which ſaid vacancy
" [or avoidance] of the church aforeſaid by the death of
" the aforeſaid *Thomas Hotchkis*, is the firſt and next va-
" cancy [or avoidance] of the ſaid church after the afore-
" ſaid grant to the ſame *Francis Symes* and *William Phil-*
" *lips* by the ſaid *John Hippeſley* in form aforeſaid made,
" and for that reaſon it belonged to the ſaid *William Phil-*
" *lips* the teſtator in his lifetime, to preſent a fit perſon to
" the church aforeſaid ſo vacant [or void]; and the ſaid
" biſhop and *John Berrow* have unjuſtly hindered him the
" ſaid *William Phillips* the teſtator; and the ſaid *William*
" *Phillips* the teſtator, the ſaid church being ſo vacant [or
" void] as aforeſaid, afterwards, to wit, on the twenty-
" firſt day of *June* in the ſixth year of the reign of our
" lord the now King, and of the lady *Mary* late Queen of
" *England*, &c., at *Stanton* aforeſaid, in the county afore-
" ſaid, made his laſt will and teſtament, and by the ſame
" did conſtitute and ordain the ſaid *William Phillips* the
" now plaintiff, executor of his ſaid will, and afterwards
" there died; after the death of which ſaid *William Phil-*
" *lips* the teſtator, the ſaid *William Phillips* the now
" plaintiff took upon himſelf the burthen and execution
" of the ſaid will, and that will hath proved in due form
" of law, to wit, at *Stanton* aforeſaid, and for that reaſon
" at preſent it belongs to him the ſaid *William Phillips* the
" now plaintiff, to preſent a fit perſon to the ſaid church
" ſo vacant [or void]: And the ſaid biſhop and *John Ber-*
" *row* do unjuſtly hinder him the ſaid *William Phillips* the
" now plaintiff; wherefore the ſame *William Phillips* the
" now plaintiff ſaith that he is injured, and has damage to
" the value of ſix hundred pounds: And therefore he
" brings ſuit, &c. With this, that the ſaid *William Phil-*
" *lips* the now plaintiff will verify that the ſaid *John Hip-*
" *peſley* is ſtill living and in full life, to wit, at *Stanton*
" aforeſaid, in the county aforeſaid; and that the church

Francis Symes one of the grantees dies, and the plaintiff's teſtator ſurvives.

The vacancy in the teſtator's life.

Teſtator made his will, and the plaintiff his executor.

Will proved.

[762]

Avers the life of the grantor and

the like day of the like year.

" of *Stanton*, otherwiſe *Stanton Fitzwarren*, otherwiſe " *Stanton Fitzherbert*, is one and the ſame church, and " not another nor different: And he brings here into " court the letters teſtamentary of the ſaid *William Phil-* " *lips* the teſtator, by which it ſufficiently appears to the " Court here, that he the ſaid *William Phillips* the now " plaintiff is executor of the ſaid will, and has adminiſ- " tration thereof, &c.

Plea of a parſon imparſonee.

" And the ſaid *Gilbert* biſhop of *Saliſbury*, and *John* " *Berrow* clerk, by *John Carpenter* their attorney, come " and defend the force and injury when, &c. And the " ſaid *John Berrow* ſaith, that he is parſon *imparſonee* of " the church aforeſaid by the collation of the ſaid biſhop; " and the ſaid biſhop and *John Berrow* further ſay, that " the ſaid *William Phillips* the executor ought not to have

Admit the vacancy, and that after ſix months the biſhop preſents by lapſe.

" his ſaid action againſt them; becauſe they ſay, that the " ſaid church of *Stanton*, otherwiſe *Stanton Fitzwarren*, " otherwiſe *Stanton Fitzherbert*, was vacant [or void] by " the death of the ſaid *Thomas Hatchkis* on the twentieth " day of *September* in the year of our Lord one thouſand " ſix hundred ninety and three, and remained ſo vacant " until the twenty-third day of *April* in the year of our " Lord one thouſand ſix hundred ninety and four, on " which day at *Stanton* aforeſaid the ſaid biſhop, becauſe " that at that time ſix months after the vacancy [or avoid- " ance] of the ſame church were fully elapſed and de- " volved, being the ordinary of that place, collated the " ſaid *John Berrow* clerk to that church then being va- " cant, as it was lawful for him: And this they are ready " to verify: Wherefore they pray judment if the ſaid " *William* the executor ought to have his ſaid action

Replies and admits the time of the vacancy.

" againſt them, &c. And the ſaid *William Phillips* the " executor ſaith, that he, notwithſtanding any matters be- " fore alleged, ought not to be precluded from having his " ſaid action, becauſe he ſaith that well and true it is that " the aforeſaid church of *Stanton*, otherwiſe *Stanton Fitz-* " *warren*, otherwiſe *Stanton Fitzherbert*, by the death of " the ſaid *Thomas Hatchkis* on the ſaid twentieth day of " *September* in the year of our Lord one thouſand ſix hun- " dred ninety-three aboveſaid, was vacant [or void] as the " ſaid biſhop and *John Berrow* in pleading have alleged: " But the ſame *William Phillips* the executor further ſaith, " that after the ſaid twentieth day of *September* in the " year of our Lord one thouſand ſix hundred ninety and " three aboveſaid, and before the ſaid twenty-third day of

But ſays that within the ſix months, to wit, on the 23d of Oct. 1693, the teſta-

" *April* in the year of our Lord one thouſand ſix hundred " ninety and four, within ſix months after the death of the " ſaid *Thomas Hatchkis*, to wit, on the ſixteenth day of " *October* in the year of our Lord one thouſand ſix hundred

" ninety

" ninety and three, the ſaid *William Phillips* the teſtator, " by his writing ſealed with his ſeal, the date of which is " on the ſame ſixteenth day of *October* in the year of our " Lord one thouſand ſix hundred ninety and three, at " *Stanton* aforeſaid, in the county aforeſaid, the ſaid " biſhop being then ordinary of the ſaid place of *Stanton*, " otherwiſe *Stanton Fitzwarren*, otherwiſe *Stanton Fitz-* " *herbert*, preſented one *John Symes*, maſter of arts, his " clerk; and then and there requeſted the ſaid biſhop to " admit and inſtitute the ſame *John Symes* to the church " aforeſaid ſo vacant by the death of the ſaid *Thomas* " *Hotchkis*, which ſaid *John Symes* the ſaid biſhop then and " there altogether refuſed to admit and inſtitute to the " ſaid church, at the aforeſaid preſentation of the ſaid " *William Phillips* the teſtator, and hindered him the ſaid " *William Phillips* the teſtator from preſenting: And this " he is ready to verify: Wherefore he prays judgment " and damages by occaſion of the hinderance [or impedi-" ment] aforeſaid, and alſo a writ to the ſaid biſhop to " him to be adjudged, *&c.*

ter by writing preſented J. Symes, and requeſted the biſhop to admit him, who refuſed.

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" And the ſaid biſhop and *John Berrow* ſay, that well " and true it is, that the ſaid *William Phillips* the teſta-" tor, by his writing ſealed with his ſeal, did preſent the " ſaid *John Symes*, as the ſame *William* the executor hath " above in his replication alleged: But the ſaid biſhop and " *John Berrow* further ſay, that afterwards, and within " ſix months after the avoidance [or vacancy] of the ſaid " church, to wit, on the ſaid ſixteenth day of *October* in " the year of our Lord one thouſand ſix hundred ninety " and three aboveſaid, the ſaid *John Symes* at *Stanton* " aforeſaid brought the preſentation aforeſaid to the ſaid " biſhop, and required the ſaid biſhop to give the ſaid " *John Symes* a few days to prepare himſelf to be exa-" mined concerning his ſufficiency in learning to have " the church aforeſaid; and that the ſaid biſhop there-" upon, at the requeſt of the ſaid *John Symes*, then and " there did give leave to the ſaid *John Symes* to go away, " and there to return to the ſaid biſhop within three " days next following, to be examined of his ſufficiency " aforeſaid, which ſaid three days were ended long before " the end of ſix months after the vacancy [or avoidance] " of the church aforeſaid by the death of the ſaid *Thomas* " *Hotchkis*, that is to ſay, by the ſpace of one month, to " wit, at *Stanton* aforeſaid. And the ſaid biſhop and " *John Berrow* further ſay, that he the ſame biſhop, for " the ſaid three days afterwards, was there ready to exa-" mine the ſaid *John Symes* concerning his ſufficiency " aforeſaid; and that the ſaid *John Symes*, neither within " the ſaid three days, nor ever afterwards, did return or

Rejoin and admit the preſentation, but ſay, That J. Symes took it away, and deſired time to prepare himſelf for examination, and never returned.

" offer himſelf to the ſaid biſhop to be examined concern-
" ing his ſaid ſufficiency; by which the ſaid church re-
" mained void [or vacant] for the ſpace of ſix months and
" upwards after the aforeſaid vacancy or avoidance by the
" death of the ſaid *Thomas Hotchkis*; whereupon the ſaid
" biſhop collated the ſaid *John Berrow* to the ſaid church
" ſo vacant [or void]; which ſaid *John Berrow* was af-
" terwards inducted into the ſame church in due form of
" law, without this, that the ſaid biſhop altogether re-
" fuſed to admit and inſtitute the ſaid *John Symes* to the
" church aforeſaid at the preſentation of the ſaid *William*
[764] " *Phillips* the teſtator, as the ſaid *William Phillips* the ex-
Traverſes his refuſal to admit J. Symes. " ecutor hath above alleged: And this they are ready to
" verify: Wherefore they pray judgment, and that the
" ſaid *William* the executor from his ſaid action be pre-
" cluded, &c.

Surrejoinder and iſſue upon the traverſe. " And the ſaid *William Phillips* the executor, as before
" ſaith, That the ſaid biſhop hath altogether refuſed to
" admit and inſtitute the ſaid *John Symes* to the church
" aforeſaid, at the preſentation of the ſaid *William Phil-*
" *lips* the teſtator, as the ſaid *William Phillips* the executor
" hath above in his replication thereupon alleged: And
" they pray that this may be inquired of by the country:
" And the ſaid biſhop and *John Berrow* likewiſe, &c.

" Therefore the ſheriff is commanded, that he cauſe to
" come here in three weeks from the day of the *Holy Tri-*
" *nity*, twelve, &c., by whom, &c., and who neither, &c.,
" to recognize, &c., becauſe as well, &c. At which day
" the parties come here, &c. And the ſheriff hath not
Continuances by non miſ. breve. " returned the writ: Therefore, as before, the ſheriff is
" commanded, that he cauſe to come here in three weeks
" from the day of St. *Michael*, twelve, &c., to recognize
" in form aforeſaid, &c. At which day the parties come
" here, &c., and the ſheriff hath not returned the writ:
" Therefore, as before, the ſheriff is commanded, that he
" cauſe to come here in eight days from the day of the
" Purification of the Bleſſed *Mary*, twelve, &c., to re-
" cognize in form aforeſaid, &c. At which day the jury
" between the ſaid parties of the aforeſaid plea was re-
" ſpited thereon between them here until this day, to wit,
" in fifteen days from the day of *Eaſter* then next follow-
" ing, unleſs the juſtices of our lord the king appointed to
" take the aſſizes in the county aforeſaid, by the form of
" the ſtatute, &c., firſt come on *Saturday* the eleventh day
" of *March* paſt, at *New Sarum* in the county aforeſaid;
" and now here at this day comes the ſaid *William* by his
" ſaid attorney, and the ſaid juſtices appointed to take aſ-
" ſizes, before, &c., have ſent here their record in theſe
" words, to wit, Afterwards at the day and place within
" contained,

" contained, before Sir *Thomas Rokeby*, Knt. one of the " juſtices of our lord the king appointed to hold pleas be- " fore the king himſelf, and Sir *John Powell*, Knt. one of " the juſtices of the ſaid lord the king of the bench, juſ- " tices of the ſaid lord the king, appointed to take aſſizes " in the county of *Wilts*, by form of the ſtatute, *&c.*, " came as well the within-named *William Phillips*, Gent. " executor of the laſt will and teſtament of *William Phil-* " *lips*, Gent. his father lately deceaſed, as the within- " named *Gilbert* Biſhop of *Saliſbury*, and *John Berrow* " clerk, by their attornies within mentioned: And the " jurors of the jury, whereof mention is within made, " being ſummoned, likewiſe came, who being elected, " tried, and ſworn to ſpeak the truth of the within con- " tents, upon their oath, ſay, that the ſaid *Gilbert* Biſhop " of *Saliſbury*, altogether refuſed to admit and inſtitute " the within-named *John Symes* to the church within " mentioned on preſentation of the ſaid *William Phillips* " the teſtator, as the ſaid *William Phillips* the executor " hath within thereupon in his replication alleged. And " the ſaid jurors upon their oath further ſay, that the " church aforeſaid is full of the ſaid *John Berrow* by the " collation of the ſaid *Gilbert* Biſhop of *Saliſbury*, as is by " him within alleged, and that the church aforeſaid is, " and from the time in which, *&c.*, was of the yearly " value of one hundred and twenty pounds in all iſſues " beyond repriſals: And the jurors aforeſaid aſſeſs the da- " mages of the ſaid *William Phillips* the executor, for his " coſts and charges by him concerning his ſuit in this be- " half applied, to forty ſhillings; therefore no reſpect be- " ing had to the beforeſaid forty ſhillings of the damages, " coſts, and charges aforeſaid, aſſeſſed by the ſaid jury by " occaſion of the hinderance aforeſaid, becauſe ſuch da- " mages by the law of the land are in nowiſe in this caſe " to be adjudged; it is conſidered that the ſaid *William* " *Phillips* the executor do recover againſt the ſaid Biſhop " of *Saliſbury* and *John Berrow*, his preſentation to the " church aforeſaid, and his damages to the value of that " church for the half of one year, which amounts to ſixty " pounds, by the jury aforeſaid in form aforeſaid aſſeſſed; " and let him have a writ to the Archbiſhop of *Canter-* " *bury*, Primate of all *England*, and Metropolitan of that " place, for that the ſaid Biſhop of *Saliſbury* is a party, " *&c.*, becauſe the ſaid *John Berrow* is admitted and in- " ſtituted to the ſame church at the collation of the ſaid " Biſhop of *Saliſbury*, and is inducted in the ſame, to re- " move the ſaid *John Berrow* from the ſaid church, and " that he may admit a fit perſon to the ſaid church at the " preſentation of the ſaid *William Phillips* the executor;

Return of the poſtea.

Find that the biſhop refuſed to admit upon the plaintiff's preſentation; and the church full upon the biſhop's collation, and the yearly value 120l.

[765]

Judgment and awarding a writ to the biſhop.

" and the aforeſaid Biſhop of *Saliſbury* and *John Berrow*
Miſericordia. " in mercy, &c. Afterwards, to wit, on *Monday* next
" after three weeks from the day of St. *Michael* in this
" ſame term, before our lord the king at *Weſtminſter*,
" come the aforeſaid biſhop and *John Berrow* by *Adrian*
Errors aſſigned. " *Moore* their attorney, and ſay, that in the record and
" proceedings aforeſaid, and alſo in the giving of the judg-
" ment aforeſaid, there is manifeſt error, in this, to wit,
" that by the record aforeſaid it appears that the ſaid judg-
" ment given in form aforeſaid was given for the ſaid
" *William Phillips* againſt the ſaid biſhop and *John Ber-*
" *row*, where by the law of the land of this kingdom of
" *England*, that judgment ought to have been given for
" the ſaid biſhop and *John Berrow* againſt the ſame *Wil-*
" *liam Phillips*, therefore in that there is manifeſt error:
" There is alſo error in this, to wit, that the record afore-
" ſaid before the lord the king now here ſent is defective
" in this, to wit, that the original writ, and the return of
" the ſame between the parties aforeſaid in the plea afore-
" ſaid, are totally omitted out of the ſaid record, and yet
" remain in the cuſtody of the keeper of the writs of the
" lord the now king of the bench, not certified to the ſame
Certiorari. " lord the king. And the ſame biſhop and *John Berrow*
" pray a writ of the ſaid lord the now king to be directed
" to the keeper of the writs of our ſaid lord the now king,
" of the bench aforeſaid, to certify the writ aforeſaid, to-
" gether with the return of the ſame writ to the ſaid lord
[766] " the king: And it is granted to them, &c., whereby it
" is given in charge to *William Thurſby*, Eſq. keeper of
" the writs of our lord the king of the bench aforeſaid,
" that having ſearched for the original writs in the county
" of *Wilts*, of the term of the *Holy Trinity* in the eighth
" year of the reign of our ſaid lord the now king, being
" in his cuſtody of record, he may ſend what he ſhall find
" in the ſame concerning the aforeſaid writ, together
" with the whole return of the ſame writ, as fully and
" entirely as they remain in his cuſtody, to the lord the
" king, without delay, whereſoever, &c., together with
" the writ of the ſaid lord the king, to himſelf thereupon
" directed, &c. Which ſaid keeper of writs, by virtue of
" that writ to him thereupon directed, hath certified to
" the ſame lord the king, that having ſearched all the ori-
" ginal writs of his county of *Wilts*, of the ſaid term of
" the *Holy Trinity* in the eighth year of his reign, in his
" cuſtody filed of record, he hath a certain original writ
" between the parties aforeſaid of the plea aforeſaid in
" his cuſtody filed of the ſame term, the tenor of which
" ſaid writ, together with the return of the ſame, fol-
Quare impedit returned. " loweth in theſe words: *William* the Third, by the grace

" of

" of GOD, of *England*, *Scotland*, *France*, and *Ireland* " King, Defender of the Faith, &c. To the ſheriff of " *Wilts*, greeting: Command *Gilbert* Biſhop of *Saliſ-* " *bury*, and *John Berrow* clerk, that juſtly and without " delay, they permit *William Phillips*, executor of the will " of *William Phillips* his father lately deceaſed, to preſent " a fit perſon to the church of *Stanton*, which is vacant [or " void], and belongs to his gift, as he ſaith, and whereof " he complains that the ſaid biſhop and *John* do unjuſtly " hinder him: And unleſs they ſhall ſo do, and the ſaid " executor ſhall make you ſecure of proſecuting his claim, " then ſummon by good ſummoners the aforeſaid biſhop " and *John*, that they be before our juſtices at *Weſtminſter*, " from the day of the *Holy Trinity* in fifteen days, to ſhew " wherefore they have not ſo done. And have you there " the ſummoners and this writ. Witneſs, *Thomas* Arch- " biſhop of *Canterbury*, and the reſt of the keepers and " juſtices of the realm at *Weſtminſter*, the twenty-eighth " day of *May* in the eighth year of our reign. *Hale.* " Eſſoin for the biſhop adjourned until three weeks from " the day of Saint *Michael*; the ſame day for the clerk " of eſſoin for the clerk adjourned until the morrow of " Saint *Martin*; the ſame day for the biſhop *William* " *Hall.* Pledges of proſecuting, *John Doe* and *Richard* " *Roe*; ſummoners, *Thomas Eyre*, *Joſeph Ruſſel*, *Edward* " *Sommer*, Eſq. ſheriff; which ſaid writ of *certiorari*, toge- " ther with the return thereof, is affiled amongſt the re- " cords without day of that term: And upon this the ſaid " *William Phillips*, by *Joſeph Sherwood* his attorney, like- " wiſe comes forthwith here in court: And thereupon " the ſaid biſhop and *John Berrow* (as before) ſay, that in " the record and proceedings aforeſaid, and alſo in the " giving of the judgment aforeſaid, there is manifeſt er- " ror, alleging the errors aforeſaid by them in form afore- " ſaid above alleged, and pray that the judgment afore- [767] " ſaid, for the aforeſaid and other errors being in the re- " cord and proceedings aforeſaid, may be reverſed, annul- " led, and altogether deemed as none; and that they be " reſtored to all things which by occaſion of the judg- " ment aforeſaid they have loſt; and that the Court of " the ſaid lord the king now here proceed to the examin- " ation as well of the record and proceedings aforeſaid, as " of the ſaid matters above aſſigned for error, and that the " ſaid *William* do rejoin to the errors aforeſaid: Upon " which the ſame *William Phillips* ſaith, that there is no " error either in the record and proceedings aforeſaid, or " in the giving of the judgment: And in like manner Judgment af- firmed. " prayeth that the Court of the ſaid lord the king now " here do proceed to the examination as well of the re-

" cord

" cord and proceedings aforeſaid, as of the ſaid matters " above aſſigned for error; and that the ſaid judgment in " all things be affirmed: But becauſe the Court of the " ſaid lord the king now here are not yet adviſed of giv- " ing their judgment of and concerning the premiſes, day " is thereupon given to the parties aforeſaid, before the " lord the king, until

whereſoever, &c.

" of hearing their judgment thereupon, for that the Court " of the ſaid lord the king now here thereof are not yet," &c.

Pleas before our Lady the Queen at Weſtminſter, *of the Term of* St. Michael *in the Third Year of the Reign of our Lady* Anne, *now Queen of* England, &c. *Roll* 144.

Goddard *againſt* Smith and another.

Salk. 21. 6 Mod. 261. 3 Salk. 245. Rep. A. Q. 56. Holt 497. S. C.

Middleſex, " BE it remembered, That heretofore, that to wit, " is to ſay, in the term of the *Holy Tri-* " *nity* laſt paſt, before our lady the queen at *Weſtminſter*, " came *Richard Goddard* by *Henry Wright* his attorney, and " brought into the Court of our ſaid lady the queen then " there his certain bill againſt *Richard Smith* and *Chriſto-* " *pher Preſton* in the cuſtody of the marſhal, &c. of a " plea of treſpaſs upon the caſe; and there are pledges " of proſecuting, namely, *John Doe* and *Richard Roe*; " which ſaid bill followeth in theſe words, that is to ſay, " *Middleſex*, to wit, *Richard Goddard* complains of *Richard* [768] " *Smith* and *Chriſtopher Preſton* in the cuſtody of the " marſhal of the *Marſhalſea* of our lady the queen, be- " fore the queen herſelf being, for that, to wit, That " whereas the ſaid *Richard Goddard* is a good, true, faith- " ful, peaceable, and honeſt ſubject, and liege man of " our lady the now queen, and was of a good name, fame, " reputation, converſation, behaviour, and condition, " and as a good, true, faithful, peaceable, and honeſt " liege man and ſubject of the ſaid lady the now queen, " being without any ſcandal, imputation, or reproach, " and hath not behaved or demeaned himſelf at any time " from the time of his nativity hitherto as a barretor or " diſturber of the peace of the ſaid lady the queen, nor " was in ſuſpicion of the like crime amongſt his neigh-

Declaration in caſe on conſpiracy for a falſe and malicious indictment of barretry, whereof he was acquitted.

" bours

" bours and other ſubjects of the ſaid lady the queen to
" whom the ſaid *Richard Goddard* was known, and by
" reaſon of his honeſt and quiet converſation aforeſaid
" for the whole time aforeſaid, lawfully and honeſtly
" gained and acquired great credit and eſteem, and alſo
" divers great gains and profits from his neighbours and
" other ſubjects of our ſaid lady the queen, with whom
" the ſaid *Richard Goddard* had commerce for the ſup-
" port of himſelf and his family: Nevertheleſs the ſaid
" *Richard Smith* and *Chriſtopher*, not ignorant of the pre-
" miſes, but contriving and maliciouſly intending not
" only to deprive him the ſaid *Richard Goddard* of his
" good name, fame, and eſteem aforeſaid, but alſo to
" bring him the ſaid *Richard Goddard* into ignominy and
" public diſgrace, that by reaſon thereof the ſubjects of
" the ſaid lady the queen might withdraw themſelves
" from the fellowſhip of him the ſaid *Richard Goddard*,
" and might altogether ceaſe and deſiſt from dealing and
" having commerce with him in any manner, on the
" thirteenth day of *September* in the firſt year of the reign
" of the ſaid lady *Anne*, now queen of *England*, &c.
" at the pariſh of St. *James Clerkenwell* in the county
" aforeſaid, then and there having had a conſpiracy be-
" tween themſelves falſely and maliciouſly to cauſe the
" ſaid *Richard Goddard* to be indicted as a barretor and
" public diſturber of the peace of the ſaid lady the queen,
" without any cauſe or colour of ſuch crime being com-
" mitted by him the ſaid *Richard Goddard*, they the ſame
" *R. Smith* and *Chriſtopher* at the pariſh aforeſaid in the
" county aforeſaid, in proſecution and execution of their
" malicious intention and conſpiracy aforeſaid, at the
" general quarter ſeſſions of the peace of our lady the
" queen held for the county of *Middleſex* at *Hicks's Hall* Indictment at
" in St. *John-ſtreet* in the county aforeſaid, before *John* Hicks's Hall.
" *Bennet*, *Henry Hawley*, and *Joſeph Offley*, Eſquires, and
" other their fellow juſtices of the ſaid lady the queen,
" appointed to keep the peace in the county aforeſaid,
" and alſo to hear and determine divers felonies, treſ-
" paſſes, contempts, and miſdemeanors in the ſame coun-
" ty committed, falſely and maliciouſly cauſed and pro-
" cured the ſaid *Richard Goddard*, with intent to defame
" the ſame *Richard Goddard*, without any lawful or true
" cauſe, to be indicted by the name of *Richard Goddard*, [769]
" late of the pariſh of St. *James Clerkenwell* in the county
" of *Middleſex*, yeoman, for that the ſame *Richard God-*
" *dard*, on the firſt day of *January* in the firſt year
" aboveſaid, and divers other days and times as well
" before as afterwards, at the pariſh aforeſaid in the
" county aforeſaid, had been and then was a common
" barretor,

" barretor, and a common, daily, and public diſturber of " the peace of the ſaid lady the now queen, and alſo a " common and turbulent ſlanderer and ſower of quarrels " and diſcords amongſt his quiet and honeſt neighbours, " ſo that he moved, procured, and ſtirred up divers con- " tentions and controverſies, and alſo brawlings, quarrels, " and fights, at the pariſh aforeſaid in the county afore- " ſaid, and elſewhere in the ſaid county of *Middleſex*, " amongſt divers liege ſubjects of the ſaid lady the queen, " to the great diſturbance of the peace of the ſaid lady " the now queen, to the evil example of all others in the " like caſe offending, and againſt the peace of the ſaid " lady the now queen, her crown and dignity, *&c.* and " did falſely and maliciouſly proſecute and cauſe to be " proſecuted the ſaid indictment againſt the ſaid *Richard* " *Goddard*, until the ſaid lady the now queen cauſed that " indictment afterwards for certain reaſons to come to
Removed by certiorari. " be determined before her: And the ſheriff of the " county aforeſaid was commanded that he ſhould not " omit, *&c.* but cauſe him to come and anſwer, *&c.* " And he the ſaid *Richard Goddard* afterwards, to wit, " in the term of St. *Michael* in the ſecond year of the " reign of the ſaid lady the now queen, in the Court of " our lady the queen, before the queen herſelf, the ſame " Court being at *Weſtminſter*, was according to the law " and cuſtom of this kingdom of *England* in a due and
Diſcharged " lawful manner thereof diſcharged. By pretence of " which ſaid premiſes againſt him the ſaid *Richard God-* " *dard*, by the ſaid *Richard Smith* and *Chriſtopher Preſton* " in form aforeſaid publiſhed, done, exhibited, and proſe- " cuted, the ſame *Richard Goddard* is not only very much " hurt and injured in his good name, fame, credit, and " reputation aforeſaid, and diſquieted and weakened in " his body, but was alſo forced to expend and lay out " divers large ſums of money in and about acquitting and " diſcharging himſelf of the ſaid indictment, and defend- " ing his innocence, to the very great diſcredit and extreme " impoveriſhment of him the ſaid *Richard Goddard*, and " to the damage of the ſaid *Richard Goddard* of twenty " pounds: And thereupon he brings ſuit, *&c.*

" And now at this day, to wit, *Monday* next after " three weeks from the day of St. *Michael* in this ſame " term, till which day the ſaid *Richard Smith* and *Chriſ-* " *topher* had leave to imparle to the ſaid bill, and then to " anſwer, *&c.* before our lady the queen at *Weſtminſter* " comes as well the ſaid *Richard* by his ſaid attorney, as " the ſaid *Richard Smith* and *Chriſtopher* by *Edmund* " *Butler* their attorney: And the ſaid *Richard* and *Chriſ-* " *topher* defend the force and injury, when, *&c.* and ſay

" that

" that they are in no manner guilty of the premiſes above " laid to their charge, as the ſaid *Richard Goddard* above " complains againſt them: And of this they put them- " ſelves upon the country; and the ſaid *Richard Goddard* " likewiſe, *&c.* Therefore let a jury come thereupon " before our lady the queen at *Weſtminſter*, on *Monday* " next after the morrow of *All Souls*, and who neither, " *&c.* to recognize, *&c.* becauſe as well, *&c.* The ſame " day is given to the parties aforeſaid there," *&c.*

Pleas before our Lady the Queen at Weſtminſter, *of the Term of the* Holy Trinity *in the Third Year of the Reign of the Lady* Anne, *now Queen of* England, *&c. Roll* 211.

Tenant *againſt* Gouldwin.

[3 Ld. Raym. Entries 485. S. C.]

Middleſex, " BE it remembered, That heretofore, that to wit, " is to ſay, in the term of *Eaſter* laſt paſt, " before our lady the queen at *Weſtminſter*, came *Robert* " *Tenant* by *John Rice* his attorney, and brought into the " court of our ſaid lady the queen then there his certain " bill againſt *Luke Gouldwin*, in cuſtody of the marſhal, " *&c.*, of a plea of treſpaſs upon the caſe; and there are " pledges of proſecuting, namely, *John Doe* and *Richard* " *Roe*; which ſaid bill followeth in theſe words, that is " to ſay, *Middleſex*, to wit, *Robert Tenant* complains of " *Luke Gouldwin* in the cuſtody of the marſhal of the " *Marſhalſea* of our lady the queen, before the queen her- " ſelf being, for that, to wit, That whereas he the ſaid " *Robert*, on the firſt day of *October* in the firſt year of " our lady *Anne*, now queen of *England*, *&c.*, and from " thence always hitherto was poſſeſſed and ſtill is poſſeſſed " of one meſſuage, ſituate, lying, and being in *Frith-* " *ſtreet* in the pariſh of St. *Anne* within the liberty of " *Weſtminſter* in the ſaid county of *Middleſex*, for a cer- " tain term of years not yet ended, and uſed to lay and " keep in his cellar, parcel of his meſſuage aforeſaid, good " ſtores of coals and ale for the uſe of his family, and alſo " to be ſold and merchandized to divers perſons who " were wont to buy that commodity in his meſſuage " aforeſaid, to the great profit and advantage of him the " ſaid

Salk. 21, 360. 6 Mod. 311. Holt 500. S. C.

Caſe for not repairing a partition wall, whereby the plaintiff was prejudiced.

" ſaid *Robert*, which ſaid cellar lies contiguous, and for
" all the time aforeſaid did lie contiguous to a meſſuage
[771] " of the ſaid *Luke* in the pariſh aforeſaid, and uſed to be
Averment of the uſage. " ſeparated and fenced from a privy-houſe, parcel of the
" aforeſaid meſſuage of the ſaid *Luke*, by a thick and cloſe
" wall which belongeth to the ſaid meſſuage of the ſaid
" *Luke*, and of right ought to have been repaired by the
Breach. " ſaid *Luke* for the whole time aforeſaid: Nevertheleſs
" the ſaid *Luke* not being ignorant of the premiſes, but
" contriving and fraudulently intending him the ſaid *Ro-*
" *bert* in this behalf unjuſtly to aggrieve, and wholly to
" deprive him the ſaid *Robert* of the uſe and advantage of
" the cellar of his meſſuage aforeſaid, and to hinder him
" of the profit of his commerce aforeſaid, on the ſame
" firſt day of *October* in the above-ſaid year of the reign of
" the ſaid lady the queen, and from thence always hitherto,
" ſo negligently kept and repaired the ſaid wall, although
" often requeſted to repair the ſame, to wit, by the ſaid
" *Robert*, on the ſame firſt day of *October* in the pariſh
" aforeſaid, that for want of due care and reparation of
" the ſame wall, the filthineſſes and naſty things of the
" ſaid privy-houſe flowed out of the ſame privy-houſe by
" the decayed parts and breaches of the wall aforeſaid into
" the cellar aforeſaid of the ſame *Robert*, and overflowed
" the ſame cellar, to wit, in the pariſh aforeſaid, for the
" whole time aforeſaid; whereby the ſame *Robert* loſt the
" uſe of his cellar, and the profit of his commerce afore-
Plaintiff damnified. " ſaid, for all the time aforeſaid: Wherefore the ſame
" *Robert* ſaith, that he is injured and hath damage to the
" value of one hundred pounds: And thereupon he brings
" ſuit, *&c.* And now at this day, to wit, *Friday* next
" after the morrow of the *Holy Trinity* in this ſame term,
" until which day the ſaid *Luke* had leave to imparle to
" the ſaid bill, and then to anſwer, *&c.* before our lady
" the queen at *Weſtminſter* comes the aforeſaid *Robert* by
" his ſaid attorney, and prays that the ſaid *Luke* may an-
" ſwer to the declaration: And the ſaid *Luke*, although
" on the ſame day ſolemnly required, doth not come nor
" ſay any thing in bar or preclusion of the aforeſaid action
Judgment by nil dicit. " of the ſaid *Robert*; whereby the ſame *Robert* remains
" againſt him thereupon undefended, for which reaſon
" the ſaid *Robert* ought to recover his damages againſt the
" ſaid *Luke*: But becauſe it is not known by the Court of
" the ſaid lady the queen now here before the queen her-
" ſelf, what damages the ſaid *Robert* hath ſuſtained by
" occaſion of the premiſes in this behalf: Therefore the
" ſheriff is commanded, that he, by the oath of twelve
" honeſt and legal men of his bailiwick, do diligently in-
" quire what damages the ſaid *Robert* hath ſuſtained, as

" well by occaſion of the premiſes, as for his coſts and
" charges by him about his ſuit in this behalf applied;
" and that he ſend the inquiſition which he ſhall take
" thereon to our lady the queen at *Weſtminſter* on *Monday*
" next after three weeks from the day of St. *Michael*, un-
" der his ſeal and the ſeals of thoſe by the oath of whom
" he ſhall take the ſaid inquiſition, together with the writ
" of our lady the queen to him for that purpoſe directed:
" The ſame day is given to the ſaid *Robert* there," &c.

Pleas before our Lady the Queen at Weſtmin- [772]
ſter, *of the Term of St.* Hilary *in the Third Year of the Reign of our Lady* Anne, *now Queen of* England, &c. *Roll* 102.

Brook *againſt* Huſtler.

England, " OUR lady the queen hath ſent to her truſty Salk. 56. Rep. A. Q. 76. S. C.
to wit, " and well-beloved Sir *Thomas Trevor*,
" Knt., her Chief Juſtice of the Bench, her writ cloſed in
" theſe words, to wit, *Anne*, by the grace of GOD, of
" *England*, *Scotland*, *France*, and *Ireland* Queen, Defender
" of the Faith, &c. To her truſty and well-beloved Sir
" *Thomas Trevor*, Knt., her Chief Juſtice of the Bench,
" greeting: For as much as in the record and proceed-
" ings, and alſo in the giving of judgment of the plaint
" which was in our court before you and your brethren,
" our juſtices of the Bench, by our writ between Sir
" *William Huſtler*, Sir *Richard Oſbaldeſton*, Knts., and
" *William Oſbaldeſton*, Eſq., and *Thomas Brook* late of *Over-*
" *ſlocton* in the county of *York*, yeoman, of a debt of ſe-
" venty and nine ſhillings and eleven pence, which the
" ſame *William*, *Richard*, and *William* demand of the ſaid
" *Thomas*, as it is ſaid, manifeſt error hath intervened, to
" the great damage of the ſame *Thomas*, as we are in-
" formed by his complaint; We willing that the error,
" if any was, be duly amended, and that full and ſpeedy
" juſtice be done to the parties aforeſaid in this behalf, do
" command you, that if judgment be thereupon given,
" then you ſend to us diſtinctly and plainly, under your
" ſeal, the record and proceedings aforeſaid, with all
" things touching the ſame, and this writ; ſo that we may
" have them from the day of *Eaſter* in fifteen days where-
" ſoever we ſhall then be in *England*, that we having in-
" ſpected

" ſpected the record and proceedings aforeſaid, may cauſe
" further to be done thereupon for amending the ſaid er-
" ror, that which of right and according to the law and
" cuſtom of our kingdom of *England* ſhall be meet to be
" done. Witneſs ourſelf at *Weſtminſter* the ſecond day
" of *March* in the ſecond year of our reign.

Hungerford.

" The anſwer of Sir *Thomas Trevor*, Knt., Chief Juſ-
" tice within-named. The record and proceedings of the
" plaint within mentioned, with all things touching the
" ſame, I ſend before our lady the queen, whereſoever,
" *&c.*, at the day within contained in a certain record to
" this writ annexed, as I am within commanded.

Thomas Trevor.

[773]

" Pleas inrolled at *Weſtminſter* before Sir *Thomas Tre-*
" *vor*, Knt., and his fellow-juſtices of our lady the queen
" of the Common Bench, of the term of St. *Hilary* in the
" ſecond year of the reign of our lady *Anne*, by the grace
" of GOD, of *England*, *Scotland*, *France*, and *Ireland*
" Queen, Defender of the Faith, *&c.* *Roll* 1228.

Declaration for an amerciament in a court-leet. Seiſin of King James I. in a court-leet.

" *Yorkſhire*, to wit, *Thomas Brook*, late of *Overſlocton* in
" the county aforeſaid, yeoman, was ſummoned to anſwer
" Sir *William Huſtler*, Knt., Sir *Richard Oſbaldeſton*, Knt,
" and *William Oſbaldeſton*, Eſq., of a plea that he render
" to them ſeventy and nine ſhillings and eleven pence,
" which he owes to them and unjuſtly detains, *&c.* And
" whereupon the ſame Sir *William Huſtler*, Sir *Richard*
" and *William Oſbaldeſton*, by *Robert Hopkinſon* their at-
" torney, ſay, that our lord *James* the Firſt, late King of
" *England*, was ſeiſed in right of his crown of *England* as
" of fee and right of and in the court-leet and view of
" frank-pledge with the appurtenances, and all and every
" thing which to a court-leet or view of frank-pledge be-
" longed, or in any manner appertained, or ought to be-
" long or appertain, within the manors or lordſhips, vil-
" lages or hamlets of *Weſt Bretton*, *Cawthorn*, *Overſlocton*,
" and *Netherſlocton*, in the ſaid county of *York*, and within
" the precincts of the ſame manors or lordſhips, villages
" and hamlets, and every of them, in the ſaid county of
" *York*, being or not being parcel of the duchy of *Lan-*
" *caſter*, of all reſident and inhabiting within the manor
" or lordſhip, village and hamlet beforeſaid, and within
" the precincts of the ſame manors or lordſhips, villages
" and hamlets, and every or any of them. The ſaid
" court-leet and view of frank-pledge aforeſaid to be
" holden twice by the year within the manors or lord-
" ſhips, villages and hamlets aforeſaid, or any of them,
" or within the precincts of the ſame manors or lord-

" ſhips,

" ſhips, villages and hamlets, or any of them, at ſuch days
" and times in the year as the ſaid lord King *James* the
" Firſt, his heirs or aſſigns, ſhould ſee fit, convenient, and
" neceſſary, according to the law and cuſtom of this king-
" dom of *England*, before the ſteward of the ſame lord
" the king of that court, or the deputy of ſuch ſteward for
" the time being: And being ſo ſeiſed, the late King
" *James* the Firſt afterwards, by his letters patent under
" the Great Seal of *England*, and under the ſeal of the
" duchy of *Lancaſter* in like manner made, bearing date
" at *Weſtminſter* in the county of *Middleſex* on the twen-
" ty-ninth day of *June* in the thirteenth year of his reign
" in *England*, and the forty-eighth in *Scotland*, which the
" ſaid Sir *William Huſtler*, Sir *Richard* and *William Oſ-*
" *baldeſton* here in court produce, as well for and in con-
" ſideration of the ſum of twenty ſhillings of lawful mo-
" ney of *England*, well and truly to be paid at the receipt
" of his Exchequer at *Weſtminſter* to his own uſe, by his
" beloved ſubject *George Wentworth* of *Bulkliffe* in *Weſt*
" *Bretton* in the county of *York*, Gent., whereof the ſame
" late lord the king did acknowledge himſelf to be fully
" ſatisfied and paid, as for divers other good cauſes and
" conſiderations the ſame lord the king eſpecially moving,
" of his eſpecial grace and certain knowledge and mere
" motion did give and grant for himſelf, his heirs and
" ſucceſſors, to the ſaid *George Wentworth*, his heirs and
" aſſigns for ever, that they ſhould and might have, hold,
" and enjoy within the manors or lordſhips, villages, or
" the hamlets of *Weſt Bretton*, *Cawthorn*, *Overſlocton*, and
" *Netherſlocton*, and every of them, in the ſaid county of
" *York*, and within the precincts of the ſame manors or
" lordſhips, villages and hamlets, and every of them, in
" the ſaid county of *York*, being or not being parcel of
" the ſaid duchy of *Lancaſter*, a court-leet and view of
" frank-pledge, to be held of all the reſidents and inha-
" bitants, and other reſidents coming within the lordſhips
" or manors, villages and hamlets aforeſaid, and within
" the precincts of the ſame manors or lordſhips, villages
" and hamlets, and every or any of them; to hold the
" ſaid court-leet and view of frank-pledge twice by the
" year from time to time within the manors or lordſhips,
" villages and hamlets aforeſaid, or any of them, or within
" the precincts of the ſame manors or lordſhips, villages
" and hamlets, or any of them, at the ſame places, days,
" and times at which the ſaid *George Wentworth*, his heirs
" or aſſigns, ſhould ſee fit, convenient, and neceſſary, ac-
" cording to the law and cuſtom of this kingdom of *Eng-*
" *land*, before the ſteward of the ſame *G. Wentworth*, his
" heirs and aſſigns for the time being, or before the de-
" puty

Grant thereof to Wentworth by letters patent under the duchy ſeal.

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To be held twice a yea. at ſuch days as the grantee ſhould think fit.

" puty of ſuch ſteward for the time being; and all and
" whatſoever to the ſaid court-leet or view of frank-pledge
" belonged, or in anywiſe appertained, or in any manner
" ought to belong or appertain, and alſo all and ſingular
" amerciaments, fines, forfeitures, pains, penalties, per-
" quiſites, profits, liberties, pre-eminences, privileges,
" rights, and juriſdictions whatſoever, which at the ſaid
" courts-leet or view of frank-pledge to the ſaid lord the
" king, or his ſucceſſors, in any manner whatſoever might
Grantee ſeiſed and held ſeveral courts, and died.
" or ought to belong; by virtue of which ſaid letters pa-
" tent the ſaid *George Wentworth* was ſeiſed as of fee and
" right of and in the court-leet and view of frank-pledge
" aforeſaid, with the appurtenances; and held divers
" courts and views of frank-pledge within the manors or
" lordſhips, villages or hamlets of *Weſt Bretton*, *Cawthorn*,
" *Overfloctlon*, and *Netherfloctlon* aforeſaid, according to the
" gift and grant aforeſaid in the letters patent contained:
" And the ſaid *George* being ſo ſeiſed of the court-leet and
" view of frank-pledge aforeſaid, with the appurtenances,
" afterwards, to wit, on the ſecond day of *June* in the
" year of our Lord one thouſand ſix hundred and thirty-
Diſcent to his ſon and heir who was ſeiſed.
" eight, at *Netherfloctlon* aforeſaid died, after whoſe death
" the ſaid court-leet and view of frank-pledge, with the
" appurtenances, did deſcend to *William Wentworth*,
And died without iſſue, whereby they deſcended to his brother.
" Gent., as ſon and heir of the ſaid *George*, whereby the
" ſaid *William Wentworth*, ſon and heir of the ſaid *George*,
" was ſeiſed as of fee and right of * and in the court-leet
" and view of frank-pledge aforeſaid, with the appurte-
* [775]
" nances; and being ſo ſeiſed thereof, the ſame *William*
" afterwards, to wit, on the fourth day of *March* in the
" year of our Lord one thouſand ſix hundred and thirty-
" nine, at *Netherfloctlon* aforeſaid, died without any iſſue
" of his body; after whoſe death the ſaid court-leet and
" view of frank-pledge, with the appurtenances, deſcended
" to *Thomas Wentworth*, Eſq., afterwards Sir *Thomas*
" *Wentworth*, Baronet, as brother and heir of the ſaid
" *William Wentworth*, whereby the ſaid *Thomas Went-*
" *worth*, as brother and heir of the ſaid *William Went-*
" *worth*, was ſeiſed of and in the court-leet and view of
" frank-pledge aforeſaid, with the appurtenances as of fee
" and right; and being ſo ſeiſed thereof, the ſaid Sir *Tho-*
Who died alſo without iſſue, whereby they deſcended to his brother.
" *mas* afterwards, to wit, on the firſt day of *April*, in the
" year of our Lord one thouſand ſix hundred and ſeventy-
" ſix, at *Netherfloctlon* aforeſaid died, without any iſſue of
" his body iſſuing; after whoſe death the ſaid court-leet
" and view of frank-pledge, with the appurtenances, did
" deſcend to Sir *Matthew Wentworth*, Baronet, as bro-
" ther and heir of the ſaid Sir *Thomas Wentworth*, where-
" by the ſaid *Matthew*, as brother and heir of the ſaid Sir

" *Thomas*

" *Thomas Wentworth*, was ſeiſed of and in the court-leet " and view of frank-pledge aforeſaid, with the appurte- " nances, as of fee and right; and being ſo ſeiſed thereof, " the ſame Sir *Matthew* afterwards, to wit, on the ſecond " day of *Auguſt* in the year of our Lord one thouſand ſix " hundred and ſeventy-eight, at *Netherſlocton* aforeſaid " died; after whoſe death the ſaid court-leet and view of " frank-pledge with the appurtenances deſcended to Sir " *Matthew Wentworth*, Baronet, as ſon and heir of the " ſaid Sir *Matthew Wentworth* the brother, whereby the " ſaid Sir *Matthew Wentworth* the ſon was ſeiſed of and " in the court-leet and view of frank-pledge aforeſaid, " with the appurtenances, as of fee and right: And the " ſaid Sir *Matthew* the ſon being ſo ſeiſed thereof, after- " wards, to wit, on the eighth day of *December* in the year " of our Lord one thouſand ſix hundred and ninety-three, " at *Netherſlocton* aforeſaid, by a certain indenture of bar- " gain and ſale made between the ſaid Sir *Matthew Went-* " *worth* the ſon, of the one part, and the ſaid Sir *William* " *Huſtler*, Sir *Richard Oſbaldeſton*, and *William Oſbaldeſton*, " of the other part, the other part whereof ſealed with the " ſeal of him the ſaid Sir *Matthew* the ſon, the ſame Sir " *William*, Sir *Richard* and *William Oſbaldeſton*, produce " here in court, the date of which is the ſame day and " year, in conſideration of five ſhillings to him in hand " paid by the ſaid Sir *William*, Sir *Richard* and *William* " *Oſbaldeſton*, bargained and ſold to them the ſaid Sir *Wil-* " *liam*, Sir *Richard* and *William*, the ſaid court-leet and " view of frank-pledge with the appurtenances, to have " and to hold to the ſame Sir *William Huſtler*, Sir *Rich-* " *ard* and *William Oſbaldeſton*, their executors, admini- " ſtrators, and aſſigns, from the day of the date of the ſaid " indenture to the end and term of one year then next " following, and fully to be complete and ended: By vir- " tue of which ſaid bargain and ſale, and by force of the " ſtatute in that behalf made and provided of transferring " uſes into poſſeſſion, the ſame Sir *William Huſtler*, Sir " *Richard* and *William Oſbaldeſton*, were in the poſſeſſion " of the court-leet and view of frank-pledge aforeſaid for " that term; and being thereof ſo poſſeſſed, and the ſaid " Sir *Matthew Wentworth* the ſon being ſeiſed of the re- " verſion of the court-leet and view of frank-pledge afore- " ſaid, with the appurtenances, as of fee and right, after- " wards, to wit, on the ninth day of *December*, in the year " of our Lord one thouſand ſix hundred and ninety-three " aboveſaid, at *Netherſlocton* aforeſaid, by a certain other " indenture made between him the ſaid Sir *Matthew* " *Wentworth* the ſon, of the one part, and the ſaid Sir " *William Huſtler*, Sir *Richard Oſbaldeſton*, and *William*

After whoſe death they deſcended to his ſon, who entered.

And by leaſe and releaſe conveyed to the plaintiffs.

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" *Oſbaldeſton*, of the other part, the other part whereof
" ſealed with the ſeal of the ſaid Sir *Matthew* the ſon,
" the ſame Sir *William Huſtler*, Sir *Richard* and *William*
" *Oſbaldeſton* produce here in court, the date whereof is
" the ſame day and year laſt above mentioned, he the ſaid
" Sir *Matthew Wentworth* the ſon, releaſed to the ſame
" *William Huſtler*, Sir *Richard* and *William Oſbaldeſton*,
" their heirs and aſſigns, all the eſtate, right, title, and
" intereſt of him the ſaid Sir *Matthew Wentworth* the
" ſon, of and in the court-leet and view of frank-pledge
Plaintiffs ſeiſed. " aforeſaid, with the appurtenances: By virtue of which
" premiſes the ſaid Sir *William Huſtler*, Sir *Richard* and
" *William Oſbaldeſton* were and ſtill are ſeiſed of and in
" the court-leet and view of frank-pledge aforeſaid, with
Defendant an inhabitant within the juriſdiction of the leet, and owed ſuit. " the appurtenances, as of fee and right; and that *Thomas*
" *Brooke*, on the twenty-fourth day of *April* in the year
" of our Lord one thouſand ſeven hundred and three, and
" long before, was reſident and an inhabitant at *Over-*
" *ſlocton* aforeſaid, within the juriſdiction of the leet and
" view of frank-pledge aforeſaid, and ought to do ſuit at
" the court of view of frank-pledge aforeſaid: And they
" the ſaid Sir *William Huſtler*, Sir *Richard* and *William*
" *Oſbaldeſton*, being ſo as aforeſaid ſeiſed of the court-leet
" and view of frank-pledge aforeſaid, with the appurte-
" nances, the court-leet and view of frank-pledge afore-
Court held April 27, 1703. " ſaid was held at *Netherſlocton* aforeſaid within the manors
" and lordſhips aforeſaid the ſaid twenty-fourth day of
" *April* in the year of our Lord one thouſand ſeven hun-
" dred and three, before *Richard Witton*, Eſq., ſteward of
" the ſaid Sir *William Huſtler*, Sir *Richard* and *William*
" *Oſbaldeſton*, of that court, of which court ſo to be held
Notice was given to the inhabitants. " due notice was given to the reſidents and inhabitants
" within the manors, lordſhips, villages, and hamlets
" aforeſaid, to wit, at *Netherſlocton* aforeſaid; and that
" the ſaid *Thomas Brooke* did not do his ſuit nor appear at
Defendant made default in not appearing, wherefore the jury preſented him. " that court, but made default; wherefore at the ſame
" court, by the jurors who were ſworn and charged in
" the ſame court to inquire and preſent thoſe things
" which appertained to the ſaid court-leet and view of
" frank-pledge, it was preſented upon their oath, that the
" ſaid *Thomas Brooke* then was reſident and an inhabitant
[777] " within the manors aforeſaid, and within the juriſdic-
" tion of the court of view of frank-pledge aforeſaid, and
" ought to have done ſuit to the court of view of frank-
" pledge aforeſaid: And that the ſaid *Thomas Brooke*, al-
" though he was then ſolemnly ſummoned, did not appear
" but made default, by reaſon whereof the ſame *Thomas*
And he was amerced by the Court and aſſeer- " *Brooke* was then and there by the ſame Court amerced,
" which ſaid amercement, by *Joſeph Senior* and *Timothy*
" *Roads*

" *Roads* then reſidents and inhabitants within the manors " aforeſaid, then and there choſen and ſworn affeerors by " the ſame Court, was then in due manner affeered to " thirty-nine ſhillings and eleven pence of lawful money " of *England*; whereof the ſaid *Thomas Brooke* after- " wards, to wit, the day and year laſt mentioned, at *Ne-* " *therſtocton* aforeſaid, had notice, whereby an action ac- " crued to the ſame Sir *William Huſtler*, Sir *Richard* and " *William Oſbaldeſton*, to demand and have of the ſaid " *Thomas Brooke* the ſaid thirty-nine ſhillings and eleven " pence parcel of the aforeſaid ſeventy-nine ſhillings and " eleven pence. And whereas alſo the ſaid *Thomas Brooke* " afterwards, to wit, on the firſt day of *July* in the year " of our Lord one thouſand ſeven hundred and three, at " *Netherſtocton* aforeſaid, borrowed of the ſaid Sir *William* " *Huſtler*, Sir *Richard* and *William Oſbaldeſton*, forty ſhil- " lings, reſidue of the aforeſaid ſeventy-nine ſhillings and " eleven pence, to be paid to the ſaid Sir *William Huſtler*, " Sir *Richard* and *William Oſbaldeſton*, when he ſhould be " thereunto required: Nevertheleſs the ſaid *Thomas* " *Brooke*, although often requeſted, hath not yet paid the " aforeſaid ſeventy-nine ſhillings and eleven pence, nor " any part thereof, to the ſame Sir *William Huſtler*, Sir " *Richard* and *William Oſbaldeſton*, or either of them, but " hath hitherto refuſed and ſtill refuſes to pay the ſame to " them or any of them; wherefore they ſay that they are " injured and have damage to the value of one hundred " ſhillings: And thereupon they bring ſuit, *&c.*

ed by two affeerors, choſen and ſworn, at 19s. 11d., of which he had notice. By which their action accrued to the plaintiffs.

Mutuatus for 40s.

" And the aforeſaid *Thomas Brooke*, by *Henry Wood* his " attorney, comes and defends the force and injury when, " *&c.*, and ſays nothing in bar or preclusion of the ſaid " action of the ſaid Sir *William Huſtler*, Sir *Richard* and " *William Oſbaldeſton*: Whereupon the ſame Sir *William* " *Huſtler*, Sir *Richard* and *William Oſbaldeſton*, remain " againſt the ſaid *Thomas Brooke* thereupon undefended: " Therefore it is conſidered that the ſaid Sir *William Huſt-* " *ler*, Sir *Richard* and *William Oſbaldeſton*, do recover " againſt the ſaid *Thomas Brooke* their ſaid debt, and their " damages by occaſion of the detention of that debt to " eight pounds, by the Court here adjudged to the ſame " Sir *William Huſtler*, Sir *Richard* and *William Oſbaldeſ-* " *ton*, by their aſſent; and the ſame *Thomas Brooke*, in " mercy, *&c.*

Nil dicit.

Judgment.

" Afterwards, that is to ſay, on *Tueſday* next after eight " days from the day of St. *Hilary* in the ſame term, be- " fore the lady the queen at *Weſtminſter* comes the afore- " ſaid *Thomas Brooke* by *Thomas Harvey* his attorney, and " ſaith, that in the record and proceedings aforeſaid, and " alſo in giving of the judgment aforeſaid, there is mani- " feſt

Errors aſſigned.

" feſt error, in this, to wit, that the declaration aforeſaid " in the record aforeſaid mentioned, and upon which the " judgment aforeſaid in form aforeſaid is given, and the " matter in the ſame contained, are not ſufficient in law " to have or maintain that judgment thereupon given in " form aforeſaid; and ſo the ſaid judgment thereupon in " form aforeſaid given is erroneous and void in law; and " therefore in that there is manifeſt error. There is er- " ror alſo in this, that where it appears by the ſaid record, " that the ſaid judgment in form aforeſaid given, was " given for the ſaid Sir *William Huſtler*, Knight, Sir " *Richard Oſbaldeſton*, Knight, and *William Oſbaldeſton*, " againſt him the ſaid *Thomas Brooke*; whereas by the " law of the land of this kingdom of *England*, judgment " in the plea aforeſaid ought to have been given for the " ſaid *Thomas Brooke* againſt them the ſaid Sir *William* " *Huſtler*, Sir *Richard Oſbaldeſton*, and *William Oſbaldeſton*; " and therefore in that there is manifeſt error: And he " prays, that the ſaid judgment for the errors aforeſaid, " and others being in the record and proceedings afore- " ſaid, be revoked, annulled, and altogether deemed as " none; and that the ſame *Thomas Brooke* be reſtored to all " things, which by occaſion of the judgment aforeſaid he " hath loſt; and that the ſaid Sir *William Huſtler*, Knight, " Sir *Richard Oſbaldeſton*, Knight, and *William Oſbalde-* Joinder in error. *ſton*, may rejoin to the errors aforeſaid, *&c.* And the " ſaid Sir *William Huſtler*, Knight, Sir *Richard Oſbaldeſ-* " *ton*, Knight, and *William Oſbaldeſton*, by *Adrian Moore* " their attorney, come and forthwith ſay, that there is not " any error either in the record and proceedings afore- " ſaid, or in the giving the judgment aforeſaid; and pray " that the Court of the lady the queen now here may pro- " ceed to the examination as well of the record and pro- " ceedings aforeſaid, as of the matters aforeſaid by him " the ſaid *Thomas Brooke* above aſſigned for errors, and Judgment affirmed. " that the judgment aforeſaid be in all things affirmed."

Pleas before the Lord the King and the Lady the Queen at Weſtminſter, *of the Term of the* Holy Trinity *in the Third Year of the Reign of our Lord* William *and Lady* Mary, *now King and Queen of* England, &c. *Roll* 166.

Barker *againſt* Winch.

Berkſhire, to wit, " SIMON *Winch* late of *Bray* in the county aforeſaid, Gent., was attached to anſwer " *Thomas Barker*, Gentleman, of a plea, wherefore with " force and arms he entered into ſix meſſuages, ſix cot- " tages, ſixty acres of land, ſixty acres of meadow, three " hundred acres of paſture, and forty acres of wood, with " the appurtenances, in the pariſh of *Bray*, which *William* " *Yieldall* and *Rebecca* his wife demiſed to the ſaid *Tho-* " *mas* for a term which is not yet paſt; and into other " ſix meſſuages, ſix other cottages, ſixty other acres of " land, ſixty other acres of meadow, three hundred other " acres of paſture, and forty other acres of wood, with " the appurtenances, in the pariſh of *Bray* aforeſaid, " which *John Lidgold* the younger alſo demiſed to the " ſaid *Thomas Barker* for a term which is not yet paſt, " and him from his farms aforeſaid ejected, and other " enormities to him did, to the great damage of the ſaid " *Thomas*, and againſt the peace of our lord the king and " our lady the queen now, *&c.* And whereupon the " ſame *Thomas Barker*, by *William Turbill* his attorney, " complains, that whereas the ſaid *William Yieldall* and " *Rebecca* his wife, on the firſt day of *April* in the third " year of the reign of our lord and lady now king and " queen of *England*, *&c.*, at the pariſh of *Bray*, demiſed " to the ſame *Thomas* the aforeſaid ſix meſſuages, ſix cot- " tages, ſixty acres of land, ſixty acres of meadow, three " hundred acres of paſture, and forty acres of wood, with " the appurtenances, to have and to occupy the ſame te- " nements with the appurtenances, to the ſame *Thomas* " *Barker* and his aſſigns, from the twenty-fifth day of " *March* then laſt paſt to the full end and term of five " years from thence next following, fully to be complete " and ended; by virtue of which ſaid demiſe the ſame " *Thomas Barker* entered into the ſaid tenements with the " appurtenances laſt aboveſaid, and was poſſeſſed thereof; " And alſo that whereas the ſaid *John Lidgold*, on the " ſame

Salk. 56. Comb. 186. 3 Salk. 34. Caſes B. R. 13. S. C. Ejectment in B. R. by original upon two ſeveral demiſes.

Second demiſe.

" ſame firſt day of *April*, in the third year aboveſaid, at
" the pariſh of *Bray* aforeſaid, demiſed to the ſame *Tho-*
" *mas Barker* the aforeſaid ſix other meſſuages, ſix other
" cottages, ſixty other acres of land, ſixty other acres of
[780] " meadow, three hundred other acres of paſture, and forty
" other acres of wood with the appurtenances, to have
" and to occupy the ſame tenements with the appurte-
" nances to the ſaid *Thomas* and his aſſigns, from the
" aforeſaid twenty-fifth day of *March* then laſt paſt unto the
" full end and term of five years from thence next follow-
" ing, and fully to be complete and ended; by virtue of
" which demiſe the ſaid *Thomas* entered into the ſaid te-
" nements with the appurtenances laſt above mentioned,
" and was poſſeſſed thereof; and being ſo poſſeſſed there-
" of, and being alſo poſſeſſed of the ſaid ſeveral tenements
" with the appurtenances as aforeſaid, the ſaid *Simon*
" *Winch* afterwards, to wit, on the ſaid firſt day of *April*
" in the third year aboveſaid, with force and arms, *&c.*
" entered into the aforeſaid tenements with the appurte-
" nances, which the ſaid *William* and *Rebecca* his wife had
" demiſed to the ſaid *Thomas Barker* in form aforeſaid, for
" the ſaid term firſt above ſpecified which is not yet paſt,
" and into the aforeſaid tenements with the appurtenances
" which the ſaid *John Lidgold* had demiſed to the ſame
" *Thomas Barker* in form aforeſaid, for the ſaid term laſt
" above ſpecified, which is not yet paſt, and him the ſaid
" *Thomas Barker* from his farms aforeſaid ejected, and
" other enormities, *&c.*, to the great damages, *&c.*, and
" againſt the peace, *&c.* Wherefore he ſaith that he is
" injured, and hath damage to the value of one hundred
Pleads in abatement that the lands are parcel of a manor in ancient demeſne.
" pounds: And thereupon he brings ſuit, *&c.* And the
" aforeſaid *Simon Winch* by *John Sandwell* his attorney
" comes and ſays, that the tenements in the declaration
" aforeſaid above ſpecified are, and from the time of
" which the memory of man is not to the contrary, were
" parcel of the manor of *Bray* in the county aforeſaid, of
" which ſaid manor our lord the king and our lady the
" queen are ſeiſed in right of their crown, and that the
" manor aforeſaid is of the ancient demeſne of the crown
And only impleadable in the court of the manor by writ of right cloſe.
" of our lord the king and our lady the queen; and that
" the aforeſaid tenements are pleadable, and have been
" pleaded in the court of the manor aforeſaid, by writ of
" right cloſe of our lord the king and our lady the queen,
" from the time of which the memory of man is not to
" the contrary; and this he is ready to verify as the Court
" ſhall conſider, *&c.* Wherefore he prays judgment if
" the Court of the lord the king and the lady the queen
" here will take conuſance of plea thereupon, *&c.*

" And

" And the aforeſaid *Thomas Barker* ſaith, that notwith- Demurrer.
" ſtanding any matters by the ſaid *Simon Winch* above in
" his plea alleged, the Court of our lord the king and lady
" the queen here ought not to be precluded from having
" cognizance of the plea aforeſaid; becauſe he ſaith that
" the plea aforeſaid by him the ſaid *Simon* in manner and
" form aforeſaid above pleaded, and the matter in the ſame
" contained, are not ſufficient in the law to preclude the
" ſaid Court of our lord the king and lady the queen now
" here from having cognizance of the plea aforeſaid, to
" which ſaid plea and the matter in the ſame contained
" the ſaid *Thomas Barker* need not, neither by the law of [781]
" the land is he bound, in any manner to anſwer: And
" this he is ready to verify: Wherefore for want of a ſuf-
" ficient anſwer in this behalf, the ſaid *Thomas* prays
" judgment and his term aforeſaid yet to come of and in
" the tenements aforeſaid with the appurtenances, toge-
" ther with his damages by occaſion of the treſpaſs and
" ejectment aforeſaid, to be to him adjudged, &c. And Special cauſe of
" for cauſes of demurrer in law upon that plea, he the demurrer.
" ſaid *Thomas*, according to the form of the ſtatute in ſuch
" caſe thereupon lately made and provided, ſhews and de-
" monſtrates to the Court here theſe cauſes following, to
" wit, For that the ſaid *Simon* in his ſaid plea hath not
" ſhewn to the Court here, nor hath alleged, that the te-
" nements aforeſaid, with the appurtenances in the ſaid
" declaration mentioned, nor any parcel thereof, are held
" of the lord and lady the now king and queen of their
" manor of *Bray* aforeſaid; and becauſe the plea afore-
" ſaid is inſenſible, uncertain, and wants form.

" And the aforeſaid *Simon* ſaith, that the plea aforeſaid Joinder.
" by him the ſaid *Simon* in manner and form aforeſaid
" above pleaded, and the matter in the ſame contained,
" are good and ſufficient in the law, to preclude the
" ſaid Court of the ſaid lord the king and lady the queen
" now here from having cognizance of the plea aforeſaid,
" which ſaid plea and the matter in the ſame contained
" he the ſaid *Simon* is ready to verify and prove as the
" Court, *&c.* And becauſe the ſaid *Thomas* hath not
" anſwered to that plea, nor hath hitherto in any manner
" contradicted it, he the ſaid *Simon* as before prays judg-
" ment, if the Court of the ſaid lord the king and lady
" the queen now here will or ought to take cognizance
" of the plea aforeſaid: But becauſe the Court of the Continuance.
" ſaid lord the king and lady the queen now here are not
" yet adviſed of giving their judgment of and concern-
" ing the premiſes, day is thereupon given to the ſaid
" parties before the lord the king and lady the queen,
" until three weeks from the day of the *Holy Trinity*,
" wherefoever,

" whereſoever, &c. of hearing their judgment therein,
" for that the Court of our ſaid lord the king and lady
" the queen now here thereof is not yet, &c. At which
" day before our lord the king and lady the queen at
" *Weſtminſter* come the parties aforeſaid by their attor-
" nies aforeſaid: But becauſe the Court of our ſaid lord
" the king and lady the queen now here are not yet ad-
" viſed of giving their judgment of and upon the pre-
" miſes, day is therefore given to the parties aforeſaid be-
" fore the lord the king and lady the queen, until on the
" morrow of Souls, whereſoever, &c. of hearing their
" judgment thereupon, for that the Court of the ſaid
" lord the king and lady the queen now here is not yet
" thereof, &c. At which day before the lord the king
" and lady the queen at *Weſtminſter* came the ſaid parties
" by their ſaid attornies: Whereupon all and ſingular the
" premiſes being ſeen, and by the Court of the ſaid lord
" the king and lady the queen now here more fully un-
[782] " derſtood, and mature deliberation being thereon had,
" for as much as it appears to the Court of our ſaid lord
" the king and lady the queen now here, that the ſaid
" plea by the ſaid *Simon* in manner and form aforeſaid
" above pleaded, and the matter in the ſame contained,
" are not ſufficient in law to preclude the ſaid Court of
" our ſaid lord the king and lady the queen now here
Judgment that he anſwer over. " from having conuſance of the plea aforeſaid; it is ſaid
" by the Court to the ſaid *Simon* that he further anſwer
" to the declaration aforeſaid; and upon this the ſaid
" *Simon* being ſolemnly required, by the ſaid *John Sand-*
" *well* his attorney, comes and defends the force and in-
" jury when, &c. and ſaith that he the ſaid *Simon* is in
Not guilty. " nowiſe guilty of the treſpaſs and ejectment aforeſaid,
" as the ſaid *Thomas* above againſt him complains: And
" of this he puts himſelf upon the country; and the ſaid
" *Thomas* in like manner, &c. Therefore the ſheriff is
Awarding a venire on a trial at bar, and continuance over for defect of jurors. " commanded that he cauſe to come before our lord
" the king and lady the queen, in eight days of the Pu-
" rification of the bleſſed *Mary*, whereſoever, &c.
" twelve, &c. by whom, &c. and who neither, &c. to
" recognize, &c. becauſe as well, &c. The ſame
" day is given to the parties aforeſaid, here, &c.
" On which day the jury aforeſaid between the parties
" aforeſaid of the plea aforeſaid is thereupon reſpited
" between them, before the lord the king and the lady
" the queen, until one month from the day of *Eaſter* from
" thence next enſuing, whereſoever, &c. for defect of
" jurors, &c. At which day before our lord the king
" and lady the queen at *Weſtminſter* came the ſaid parties
" by their ſaid attornies, and the jurors of that jury being
" likewiſe

" likewiſe ſummoned came, who were elected, tried, and
" ſworn to ſpeak the truth concerning the premiſes;
" and as to the treſpaſs and ejectment aforeſaid of and
" in the ſaid ſix meſſuages, ſix cottages, ſixty acres of
" land, ſixty acres of meadow, three hundred acres of
" paſture, and forty acres of wood, with the appurte-
" nances, in the declaration aforeſaid by the ſaid *William*
" *Yieldall* and *Rebecca* his wife to the ſaid *Thomas Barker*
" demiſed as aforeſaid, upon their oath ſay, as to one
" fourth part of thirty-two acres of land thereof, with
" the appurtenances, held of the manor of *Lords Lands*,
" and being in the tenure of one *William Whitehand*, that
" the ſaid *Simon Winch* is guilty of the treſpaſs and eject-
" ment aforeſaid, as the ſaid *Thomas* above againſt him
" complains; and as to the reſidue of the ſaid ſix meſ-
" ſuages, ſix cottages, ſixty acres of land, ſixty acres
" of meadow, three hundred acres of paſture, and
" forty acres of wood, with the appurtenances, by the
" ſaid *William Yieldall* and *Rebecca* to the ſaid *Tho-*
" *mas* demiſed as aforeſaid, the ſame jurors upon their
" oath aforeſaid ſay, that the ſaid *Simon* is not guilty of
" the treſpaſs and ejectment aforeſaid, as the ſaid *Simon*
" hath above in his plea alleged; and as to the treſpaſs
" and ejectment aforeſaid, of and in the ſaid ſix other
" meſſuages, ſix other cottages, ſixty other acres of land,
" ſixty other acres of meadow, three hundred other acres
" of paſture, and forty other acres of wood with the ap-
" purtenances, in the declaration aforeſaid, by the ſaid
" *John Lidgold* the younger, to the ſaid *Thomas Barker*
" demiſed as aforeſaid, the ſame jurors ſay upon their
" oath aforeſaid, as to one fourth part of thirty-two
" acres of land held of the manor of *Lords Lands*, and
" being in the tenure of the ſaid *William Whitehand*, that
" the ſaid *Simon Winch* is guilty of the treſpaſs and
" ejectment aforeſaid, as the ſaid *Thomas* above complains
" againſt him, and aſſeſs the damages of him the ſaid
" *Thomas* by occaſion of the premiſes aforeſaid, beſides
" his coſts and charges by him concerning his ſuit in this
" behalf applied, to twenty ſhillings, and for thoſe coſts
" and charges to thirty ſhillings: And as to the reſidue
" of the ſaid ſix other meſſuages, ſix other cottages, ſixty
" other acres of land, ſixty other acres of meadow, three
" hundred other acres of paſture, and forty other acres of
" wood, with the appurtenances, in the declaration afore-
" ſaid, by the ſaid *John Lidgold* demiſed as aforeſaid, the
" ſame jurors upon their ſaid oath further ſay, that the
" ſaid *Simon Winch* is not guilty of the treſpaſs and eject-
" ment aforeſaid, as the ſaid *Simon* above in his plea hath
" alleged: Therefore it is conſidered that the ſaid *Thomas*

Verdict as to the firſt demiſe.

As to part for the plaintiff, and not guilty as to other part.

And as to the ſecond demiſe, find as part for the plaintiff, and part for the defendant.

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Judgment as to what the defend-

ant in ſecond ſeries.

"*Barker* do recover againſt the ſaid *Simon Winch* his ſaid "term yet to come of and in the ſaid fourth part of the "ſaid thirty-two acres of land with the appurtenances "held of the manor of *Lords Lands*, and being in the "tenure of the ſaid *William Whiteband*, parcel of the "ſaid ſix meſſuages, ſix cottages, ſixty acres of land, "ſixty acres of meadow, three hundred acres of paſture, "and forty acres of wood, with the appurtenances, by "the ſaid *William Yieldall* and *Rebecca* his wife to the "ſaid *Thomas Barker* demiſed as aforeſaid, whereof it is "above found by the ſaid jury, that the ſaid *Simon* is "guilty of the treſpaſs and ejectment aforeſaid, and his "ſaid other term yet to come of and in the ſaid other "fourth part of the ſaid thirty-two acres of land "with the appurtenances, held of the manor of *Lords* "*Lands* aforeſaid, in the tenure of the ſaid *William* "*Whiteband*, parcel of the aforeſaid ſix other meſſuages, "ſix other cottages, ſixty other acres of meadow, three "hundred other acres of paſture, and forty other acres "of wood, with the appurtenances, by the ſaid *John* "*Lidgold* the younger to the ſaid *Thomas Barker* demiſed "as aforeſaid; whereof it is likewiſe above found by the "jury aforeſaid, that the ſaid *Simon* is guilty of the treſ-"paſs and ejectment aforeſaid, and his ſaid damages by "the ſaid jury in form aforeſaid aſſeſſed; and alſo ninety-"nine pounds for his coſts and charges aforeſaid adjudged "by the Court of the ſaid lord the king and lady the "queen now here to the ſaid *Thomas Barker*, by his "aſſent, of increaſe; which ſaid damages in the whole

Copiatur.

"amount to one hundred and one pounds; and that the "ſaid *Simon Winch* be taken, &c., and likewiſe that the "ſaid *Thomas Barker* be in mercy for his falſe complaint "againſt the ſaid *Simon Winch*, for the reſidue of the

Acquittal, and without day as to the reſt.

"treſpaſs and ejectment aforeſaid; whereof the ſaid *Simon* "by the jury aforeſaid in form aforeſaid is acquitted, and "that the ſaid *Simon* go thereupon without day," &c.

Pleas before the Lord the King at Weſtminſter, *of the Term of the* Holy Trinity *in the Third Year of the Reign of our Lord* James *the Second, now King of* England, &c. *Roll* 1019.

Counteſs of Plymouth *againſt* Throgmorton and his Wife.

Writ of error. 3 Mod. 153. Salk 65. S. C.

" THE lord the king hath given in charge to his " truſty and well-beloved Sir *Edward Herbert*, Knt., " his Chief Juſtice of the Common Bench, his writ cloſed " in theſe words, to wit, *James* the Second, by the Grace " of GOD, of *England*, *Scotland*, *France*, and *Ireland* " King, Defender of the Faith, &c. To his truſty and " well-beloved Sir *Edward Herbert*, Knt., his Chief " Juſtice of the Common Bench, greeting: Foraſmuch " as in the record and proceedings, and alſo in the giving " the judgment of the plaint which was in our Court " before you and your brethren our juſtices of the Com- " mon Bench, by our writ, between *Thomas Throckmorton*, " Eſq. and *Dorothy* his wife, executrix of the will of Sir " *Edward Pick*, Knt. and *Bridget* counteſs dowager of " *Plymouth*, executrix of the will of *Charles* earl of *Ply-* " *mouth*, to the end that the ſame *Bridget* counteſs dowa- " ger of *Plymouth*, ſhould render to the ſaid *Thomas* and " *Dorothy* ſeventy-five pounds, as it is ſaid, manifeſt error " hath intervened to the great damage of her the ſaid " *Bridget* counteſs dowager of *Plymouth*, as we are in- " formed by her complaint; We willing that the error, " if any hath been, be in due manner amended, and that " full and ſpeedy juſtice be done to the ſaid parties in " this behalf, do command you, that if judgment be " thereupon given, then you ſend to us under your ſeal " diſtinctly and plainly the record and proceedings afore- " ſaid, with all things touching the ſame, and this writ; " ſo that we may have them from the day of the *Holy* " *Trinity* in three weeks, whereſoever we ſhall then be in " *England*, that inſpecting the record and proceedings " aforeſaid, we may cauſe to be done farther thereupon, " for amending that error, that which of right and ac- " cording to the law and cuſtom of our kingdom of " *England* ſhall be meet to be done. Witneſs ourſelf at " *Weſtminſter* the eighth day of *June* in the third year of " our reign. *Santhey.*

" The

" The anſwer of Sir *Edward Herbert*, Knt. Chief Juſ-
" tice within named. The record and proceedings of the
" plaint within mentioned, with all things touching the
" ſame, before the lord the king, wheresoever, &c. at
" the day within contained, I ſend in a certain record to
" this writ annexed, as I am within commanded.

Edw. Herbert.

" Pleas at *Weſtminſter*, before Sir *Edward Herbert*,
" Knt. and his fellow juſtices of the lord the king of the
" Common Bench, of the term of *Eaſter* in the third
" year of the reign of our lord *James* the Second, by the
" Grace of GOD, of *England*, *Scotland*, *France*, and *Ire-*
" *land* King, Defender of the Faith, &c. *Roll* 616.

" *Middleſex*, to wit, *Bridget* counteſs dowager of *Ply-*
" *mouth*, executrix of the laſt will and teſtament of
" *Charles* earl of *Plymouth*, was ſummoned to anſwer
" *Thomas Trockmorton*, Eſq. and *Dorothy* his wife, execu-
" trix of the laſt will and teſtament of Sir *Edward Pick*,
" Knt. of a plea that ſhe render to them ſeventy-five
" pounds, which from them ſhe unjuſtly detains, &c.
Declaration upon a warrant of attorney to the executors and her husband.
" And whereupon the ſame *Thomas* and *Dorothy*, by
" *Charles Draper* their attorney, ſay, that whereas the
" ſaid earl in his lifetime, to wit, on the third day of
" *May* in the thirty-ſecond year of the reign of our lord
" *Charles* the Second, late king of *England*, &c. at *Iſling-*
" *ton*, by his certain deed, which the ſame *Thomas* and
" *Dorothy* produce here in court, dated the ſame day and
" year, did give an authority to the ſame Sir *Edward*
" to require and receive all and all manner of ſum and
" ſums of money which then were, or at any time or
" times to come within three years then next following
" ſhould become due and payable to the ſame earl upon
" any account whatſoever, and to pay and diſpoſe there-
" of as he the ſaid earl from time to time ſhould order
" and appoint the ſame *Edward* by any writing or writ-
" ings under his hand during the ſaid three years, and
" for the care and labour of the ſaid Sir *Edward* in the
" premiſes aforeſaid, the ſaid earl bound himſelf by
Sixty pounds per ann. allowed to the attorney to be deducted out of what he receives.
" the ſame writing to pay to the ſaid Sir *Edward* one
" hundred pounds by the year of lawful money of *Eng-*
" *land* during the aforeſaid three years, or otherwiſe that
" it ſhould be lawful for the ſaid Sir *Edward Pick* to
" retain and pay to himſelf the ſaid one hundred pounds
" by the year during the aforeſaid three years, out of ſuch
" monies as he ſhould receive by virtue of the ſaid deed,
" as by the ſame deed more fully appears; and the ſaid
" *Thomas* and *Dorothy* in fact ſay, that he the ſaid *Ed-*

" *ward*

" *ward* afterwards, and for the ſpace of three quarters of " a year from thence next following, at *Iſlington* afore- " ſaid, from time to time did ſolicit and require divers " perſons then debtors to the ſaid earl to pay many ſums " of money then from them due and payable to the ſaid " earl: But during the ſaid three quarters of a year, or " at any time afterwards, the ſaid Sir *Edward* did not " receive any ſums of money by virtue of the ſame deed, " wherewith he could pay himſelf the ſaid one hundred " pounds, or any part thereof; whereby an action ac- " crued to the ſame Sir *Edward* in his lifetime, to require " and have of the ſaid earl the ſaid ſeventy-five pounds: " Nevertheleſs the ſaid earl in his lifetime, and the ſaid " counteſs after his the ſaid earl's death, although often " requeſted, or either of them, have or hath not yet paid " the ſeventy-five pounds to the ſaid Sir *Edward* in his " lifetime, or to the ſaid *Dorothy* after the death of the " ſaid Sir *Edward* while ſhe was ſole, or to the ſaid " *Thomas* and *Dorothy* after the marriage between them " celebrated, or to any of them, but refuſed to pay the " ſame to the ſaid Sir *Edward* in his lifetime, and to the " ſame *Thomas* and *Dorothy* after the marriage between " them celebrated; and ſhe the ſame counteſs doth ſtill " refuſe to render the ſame to the ſaid *Thomas* and *Do-* " *rothy*, and unjuſtly detains the ſame in delay of the " faithful execution of the will of the ſaid Sir *Edward*, " and to the damage of them the ſaid *Thomas* and *Dorothy* " of ten pounds: And thereupon they bring ſuit, *&c.* " And the ſame *Thomas* and *Dorothy* produce here in " court the letters teſtamentary of the aforeſaid *Edward*, " by which it ſufficiently appears to the Court here, that " ſhe the ſaid *Dorothy* is executrix of the will of the ſaid " *Edward*, and thereof hath adminiſtration, *&c.*

The attorney demands ſeveral ſums of money, but none paid.

[786]

Whereby the action accrued.

Breach.

Profert of the letters teſtamentary produced.

" And the ſaid *Bridget*, by *William Rymer* her attorney, " comes and defends the force and injury, when, *&c.* " and ſays nothing in bar or preclaſion of the action of " the ſaid *Thomas* and *Dorothy* aforeſaid, whereby the " ſame *Thomas* and *Dorothy* thereupon remain againſt the " aforeſaid *Bridget* undefended: Therefore it is conſi- " dered, That the ſaid *Thomas* and *Dorothy* recover againſt " the ſaid *Bridget* their ſaid debt, and their damages by " occaſion of the detention of that debt, to fifty ſhillings, " to the ſame *Thomas* and *Dorothy*, by their aſſent, by the " Court here adjudged, to be levied of the goods and " chattels which were the ſaid earl's at the time of his " death, being in the hands of the ſame *Bridget* to be " adminiſtered, if ſhe hath ſo much in her hands to ad- " miniſter; and if ſhe hath not, that then the damages

Judgment by nil dicit.

" aforeſaid

" aforeſaid be levied of the proper goods and chattels of
" the ſaid *Bridget*; and the ſaid *Bridget* counteſs of *Ply-*
" *mouth*, in mercy, &c.

Errors aſſigned. " And the aforeſaid *Bridget* counteſs dowager of *Ply-*
" *mouth*, by *Henry Doughty* her attorney, cometh and
" ſaith, that in the record and proceedings aforeſaid, and
" alſo in giving of the judgment aforeſaid, there is ma-
" nifeſt error, in this, to wit, That the declaration afore-
" ſaid, and the matter in the ſame contained, are not
" ſufficient in the law to have and maintain the action
" aforeſaid of the ſaid *Thomas* and *Dorothy* thereupon againſt
" her the ſaid counteſs: Therefore in that there is mani-
" feſt error. There is error alſo in this, that by the record
[787] " aforeſaid it appears, that the ſaid judgment in manner
" and form aforeſaid given was given for the ſaid *Thomas*
" and *Dorothy* againſt her the ſaid counteſs, in the plea
" aforeſaid, whereas by the law of the land of this king-
" dom of *England*, that judgment ought to have been
" given for the ſame counteſs againſt the ſaid *Thomas* and
" *Dorothy*; and therefore in this there is likewiſe mani-
" feſt error: And the ſaid counteſs further ſaith, that
No warrant of attorney, and certiorari prayed. " there is error in this alſo, to wit, that there is not any
" warrant of attorney filed of record in the ſaid Court
" of Common Bench between the ſaid parties of the plea
" aforeſaid, to warrant *Charles Draper* to be attorney for
" the ſaid *Thomas* and *Dorothy* againſt the ſaid counteſs
" in the plea aforeſaid; therefore in that likewiſe there
" is manifeſt error; wherefore the ſame counteſs prays
" a writ of the lord the king of *certiorari* to be directed
" to the Chief Juſtice of the ſaid lord the king of the
Entry of the certiorari. " Common Bench, &c. And it is granted to her, &c.
" by which it is commanded that Sir *Edward Herbert*,
" Knt., Chief Juſtice of the Common Bench aforeſaid,
" examine the rolls and other remembrances of the war-
" rants of attorney of the county of *Middleſex*, of the
" term of *Eaſter* in the third year of the reign of the ſaid
" lord the king, being in his cuſtody of record, and with-
" out delay to certify what in the ſame he ſhall find there-
" upon to the ſaid lord the king, wherefoever, &c. to-
" gether with the writ of the ſaid lord the king, to him
Return of the Chief Juſtice. " for that purpoſe directed, &c. Which ſaid Chief
" Juſtice of the Bench aforeſaid of our ſaid lord the king
" anſwered, that the execution of the writ aforeſaid ap-
" peared in a ſchedule to the ſame writ annexed, in which
" ſchedule are contained the title of the rolls of the war-
" rants of attorney filed of the ſaid term of *Eaſter* in the
" aforeſaid writ ſpecified, being in the cuſtody of him
" the ſaid Chief Juſtice of record; and the record of a
" certain warrant of attorney between the parties afore-
" ſaid

" ſaid of the plea aforeſaid in the ſame form in which the " ſame warrant of attorney is entered of record in the " ſame rolls, which ſaid title and warrants of attorney " follow in theſe words. Rolls of attornies received be- " fore Sir *Edward Herbert*, Knt., Chief Juſtice of the lord " the king of the Common Bench, and his brethren, of the " term of *Eaſter* in the third year of the reign of our " lord *James* the Second, by the Grace of GOD, of " *England*, *Scotland*, *France*, and *Ireland* King, De- " fender of the Faith, &c.

" *Middleſex*, to wit, *Thomas Throckmorton*, Eſq. and Warrant of at-
" *Dorothy* his wife, executrix of the laſt will and teſta- torney.
" ment of Sir *Edward Pick*, Knt. puts in his ſtead *Charles* " *Draper* his attorney, againſt *Bridget* counteſs dowager " of *Plymouth*, executrix of the laſt will and teſtament of " *Charles* earl of *Plymouth*, of a plea of debt, which ſaid " writ is filed amongſt the records without day, &c. " And hereupon the aforeſaid *Thomas* and *Dorothy*, by " *Michael Johnſon* their attorney, come *gratis* here in " court, and the aforeſaid *Bridget* counteſs dowager of " *Plymouth* as aforeſaid, ſaith, that in the record and " proceedings, and alſo in the giving of judgment afore- " ſaid, there is manifeſt error, alleging the errors afore- " ſaid by him in form aforeſaid alleged, and prays that " the ſaid judgment for the errors aforeſaid, and others [788]
" being in the record and proceedings aforeſaid, may be " reverſed, annulled, and entirely deemed as none; and " that ſhe be reſtored to all which by occaſion of the " judgment aforeſaid ſhe hath loſt, &c. And that the " ſaid *Thomas* and *Dorothy* to the errors aforeſaid may " rejoin, &c. And that the Court of the ſaid lord the " king here may proceed to the examination as well of " the record and proceedings aforeſaid as the matters " aforeſaid above aſſigned for errors, &c. And the ſaid " *Thomas* and *Dorothy* ſay, that there is not any error " either in the record and proceedings aforeſaid, or in " the giving of the judgment aforeſaid; and in like man- Defendants re-
" ner pray that the Court of the ſaid lord the king may join in error.
" proceed to the examination as well of the record and " proceedings aforeſaid, as of the matters aforeſaid above " aſſigned for errors, and that the judgment aforeſaid " be in all things affirmed, &c. And becauſe the Court Continuances.
" of the ſaid lord the king now here are not yet adviſed " of giving their judgment herein; day is therefore given " to the parties aforeſaid before the ſaid lord the king, " until three weeks from the day of St. *Michael* then next " following, whereſoever, &c. of hearing their judgment " thereon, foraſmuch as the Court of the lord the king " now here are not yet thereupon, &c. At which day

" before the king at *Weſtminſter* come the parties aforeſaid by their ſaid attornies: But becauſe the Court of the ſaid lord the king now here are not yet adviſed of giving their judgment of and upon the ſaid premiſes, day is therefore given to the parties aforeſaid before the lord the king, until eight days from the day of St. *Hilary*, wherefoever, *&c.* of hearing their judgment thereon, foraſmuch as the Court of the ſaid lord the king here thereon are not yet, *&c.* At which day before the lord the king at *Weſtminſter* come the parties aforeſaid by their ſaid attornies: But becauſe the Court of the ſaid lord the king now here are not yet adviſed of giving their judgment of and upon the premiſes, day is therefore given to the parties aforeſaid before the lord the king, until fifteen days from the day of *Eaſter*, wherefoever, *&c.* of hearing their judgment thereon, in regard that the Court of the ſaid lord the king here therein are not yet, *&c.* At which day before the lord the king at *Weſtminſter* come the ſaid parties by their attornies aforeſaid: Upon which as well the record and proceedings aforeſaid, and the judgment given thereon, as the ſaid cauſes and matters above aſſigned for errors, being ſeen and more fully underſtood and diligently examined by the Court of our ſaid lord the king here; foraſmuch as it ſeems to the Court of our ſaid lord the king now here, that in the record and proceedings aforeſaid, and alſo in the giving of the judgment aforeſaid, there is manifeſt error, it is conſidered that the ſaid judgment for the errors aforeſaid, and others in the record and proceedings aforeſaid, be revoked, annulled, and altogether deemed as none; and that the aforeſaid *Bridget* counteſs dowager of *Plymouth*, be reſtored to all things which by occaſion of the judgment aforeſaid ſhe hath loſt," *&c.*

Judgment reverſed.

Pleas before the Lord the King at Weſtminſter, *of the Term of* Eaſter *in the Eighth Year of the Reign of our Lord* William *the Third, now King of* England, *&c. Roll* 291.

Freeman and others *againſt* Bernard and others.

[3 Ld. Raym. Entries 368. S. C.]

Comb. 440. Carth. 378. Salk. 69. Caſes B. R. 130. 3 Salk. 45. Holt 79. S. C.

London, " BE it remembered, That heretofore, to wit, to wit, " in the term of St. *Hilary* in the ſixth year " of the reign of the lord *William* the Third, now King " of *England*, *&c.*, before the ſame lord the king at *Weſt-* " *minſter* came *Thomas Freeman* and *Thomas Haggar* by " *Benjamin Mould* their attorney, and brought into the " court of our ſaid lord the king then there their certain " bill againſt *Samuel Bernard* and *Thomas Rodbard* in cuſ- " tody of the marſhal, *&c.* of a plea of treſpaſs upon the " caſe, *&c.*; and there are pledges of proſecuting, name- " ly, *John Doe* and *Richard Roe*; which ſaid bill follow- " eth in theſe words; that is to ſay, *London*, to wit, *Tho-* " *mas Freeman* and *Thomas Haggar* complain of *Samuel* " *Bernard* and *Thomas Rodbard* in the cuſtody of the mar- " ſhal of the *Marſhalſea* of the lord the king, before the " king himſelf being, for that, to wit, that whereas on the " eighth day of *Auguſt* in the year of our Lord one thou- " ſand ſix hundred and ninety-three, at *London* aforeſaid, " to wit, in the pariſh of St. *Mary le Bow* in the ward of " *Cheap*, it was agreed between them the ſaid *Thomas* " *Freeman* and *Thomas Haggar* and the ſaid *Samuel Ber-* " *nard* and *Thomas Rodbard* in manner and form follow- " ing; that is to ſay, that the ſaid *Samuel Bernard* and " *Thomas Rodbard* ſhould deliver to the ſaid *Thomas Free-* " *man* and *Thomas Haggar* ſixteen bags of good new hops " of the then next growth, good brewers ware, at thirty " and four ſhillings by the hundred weight, and that they " ſhould be delivered at or before the twenty-fifth day of " *December* then next following, and thereupon in conſi- " deration that the ſaid *Thomas Freeman* and *Thomas* " *Haggar* had paid to the ſaid *Samuel Bernard* and *Thomas* " *Rodbard* one piece of gold coin, called a guinea, of law- " ful money of *England*, in part of payment thereof, and " then and there, at the ſpecial inſtance and requeſt of " them the ſame *Samuel Bernard* and *Thomas Rodbard*, " had took upon themſelves and had faithfully promiſed " the ſaid *Samuel* and *Thomas Rodbard* to perform the " agreement aforeſaid in all things on the part of them the

Declaration upon an agreement to deliver ſixteen bags of hops before December 25.

Mutual promiſes to perform the agreement.

" ſaid *Thomas Freeman* and *Thomas Haggar* to be per-
" formed or fulfilled, according to the form and effect of
" the aforeſaid agreement, they the ſaid *Samuel Bernard*
" and *Thomas Rodbard* took upon themſelves, and then and
" there faithfully promiſed the ſaid *Thomas Freeman* and
" *Thomas Haggar*, that they the ſame *Samuel* and *Thomas*
" *Rodbard* would well and truly perform and fulfil the
" agreement aforeſaid in all things on the part of them the
" ſaid *Samuel* and *Thomas Rodbard* to be performed or ful-
" filled: Nevertheleſs the ſaid *Samuel* and *Thomas Rod-*
" *bard* their promiſe and undertaking aforeſaid not at all
" regarding, but contriving and fraudulently intending
Breach in not delivering the hops. " the ſame *Thomas Freeman* and *Thomas Haggar* in this
" part craftily and ſubtilly to deceive and defraud, have
" not delivered to the ſaid *Thomas Freeman* and *Thomas*
" *Haggar*, or either of them, the ſaid ſixteen bags of hops,
" or any parcel thereof, upon or before the ſaid twenty-
" fifth day of *December* next following after the making
" the ſaid agreement, or at any time afterwards, but have
" hitherto altogether refuſed and ſtill do refuſe to deliver
Second count upon another agreement in writing ſet forth, to deliver other ſixteen bags of hops, and left in the hands of a third perſon. " the ſame to them. And whereas alſo afterwards, to
" wit, on the ſaid eighth day of *Auguſt* in the year of our
" Lord aforeſaid, at *London* aforeſaid, in the pariſh and
" ward aforeſaid, a certain other agreement was had and
" made in writing between the ſaid *Samuel* and *Thomas*
" *Rodbard* and them the ſaid *Thomas Freeman* and *Thomas*
" *Haggar* in form following, that is to ſay, that the ſaid
" *Samuel Bernard* and *Thomas Rodbard* ſhould deliver to
" them the ſame *Thomas Freeman* and *Thomas Haggar*
" ſixteen other bags of good new hops of the then next
" growth, good brewers ware, at the rate of thirty-four
" ſhillings by the hundred; and that they ſhould be deli-
" vered upon or before the twenty-fifth day of *December*
" then next following, which ſaid written agreement was
" left in the hands of one *Thomas Ruck*: And whereas af-
" terwards, to wit, on the ſame eighth day of *Auguſt* in
" the year abovefaid, at *London* aforeſaid, in the pariſh and
Colloquium touching the agreement. " ward aforeſaid, a certain diſcourſe was had and moved
" between the ſaid *Samuel* and *Thomas Rodbard* and the
" ſaid *Thomas Freeman* and *Thomas Haggar*, of and con-
" cerning the ſaid agreement laſt mentioned, and of and
" concerning the delivery of two loads of hops to the ſame
" *Thomas Freeman* and *Thomas Haggar*, by the ſaid *Samuel*
" and *Thomas Rodbard* to be made, and upon that diſ-
" courſe between the ſaid *Samuel* and *Thomas Rodbard*
" and the ſame *Thomas Freeman* and *Thomas Haggar*, two
" other loads of hops, according to the ſaid agreement, ſo
" as aforeſaid left in the hands of the ſaid *Thomas Ruck*, and
" that they the ſame *Thomas Freeman* and *Thomas Haggar*
" ſhould

" ſhould accept the ſaid hops laſt mentioned, according to
" the ſaid firſt agreement laſt recited; and thereupon, in Mutual promiſes.
" conſideration that they the ſame *Thomas Freeman* and
" *Thomas Haggar* then and there, at the ſpecial inſtance
" and requeſt of the ſaid *Samuel* and *Thomas Rodbard* had
" paid to the ſaid *Samuel* and *Thomas Rodbard* one other
" piece of gold coin, called a guinea, of lawful money of
" *England*, in part of payment for the ſame hops laſt men-
" tioned, and had took upon themſelves, and faithfully [791]
" promiſed the ſame *Samuel* and *Thomas Rodbard* to per-
" form and fulfil the agreement aforeſaid in all things on
" the part of them the ſaid *Thomas Freeman* and *Thomas*
" *Haggar* to be performed and fulfilled, according to the
" form and effect of the agreement aforeſaid laſt men-
" tioned, they the ſame *Samuel* and *Thomas Rodbard* took
" upon themſelves, and then and there faithfully promiſed
" the ſame *Thomas Freeman* and *Thomas Haggar*, that they
" the ſame *Samuel* and *Thomas Rodbard* would well and
" faithfully perform and fulfil the ſaid agreement laſt
" mentioned in all things on the part of them the ſaid *Sa-*
" *muel* and *Thomas Rodbard* to be performed and fulfilled:
" Nevertheleſs the aforeſaid *Samuel* and *Thomas Rodbard* Breach.
" their ſaid promiſes and undertakings laſt mentioned in
" form aforeſaid made not regarding, but contriving and
" fraudulently intending the ſame *Thomas Freeman* and
" *Thomas Haggar* in this behalf craftily and cunningly to
" deceive and defraud, have not, nor hath either of them
" delivered the ſaid two loads of hops laſt mentioned, or
" any parcel thereof, to the ſame *Thomas Freeman* and
" *Thomas Haggar*, upon or before the ſaid twenty-fifth
" day of *December* next following after the making the
" ſaid promiſe and undertaking laſt mentioned, or at any
" time afterwards, but have hitherto altogether refuſed,
" and yet do refuſe, to deliver the ſame to them; where-
" fore the ſaid *Thomas Freeman* and *Thomas Haggar* ſay,
" that they are injured and have damage to the value of
" two hundred pounds: And thereupon they bring ſuit,
" *&c.*

" And now at this day, to wit, *Wedneſday* next after fif-
" teen days from the day of *Eaſter*, until which day the
" ſaid *Samuel* and *Thomas Rodbard* had leave to imparle to
" the ſaid bill, and then to anſwer, *&c.* before the lord
" the king at *Weſtminſter*, come as well the ſaid *Thomas*
" *Freeman* and *Thomas Haggar* by their ſaid attorney, as
" the ſaid *Samuel* and *Thomas Rodbard* by *John Bernard*
" their attorney: And the ſame *Samuel* and *Thomas Rod-*
" *bard* defend the force and injury when, *&c.*, and ſay
" that the ſaid *Thomas Freeman* and *Thomas Haggar* ought
" not to have or maintain their action aforeſaid thereupon

A ſubmiſſion to arbitration pleaded.

" againſt them; becauſe they ſay, that after the making " the ſeveral promiſes and undertakings above in the ſaid " declaration ſpecified, that is to ſay, on the ſecond day " of *November* in the year of our Lord one thouſand ſix " hundred and ninety-four, at *London* aforeſaid, to wit, at " the pariſh of St. *Mary le Bow* in the ward of *Cheap* " aforeſaid, as well the ſaid *Thomas Freeman* and *Thomas* " *Haggar* as the ſaid *Samuel* and *Thomas Rodbard* did ſub- " mit and put themſelves to the award, ordination, and " judgment of Sir *John Parſons*, Knight, and *Richard* " *Hammond*, brewers arbitrators, as well on the part of the " ſaid *Thomas Freeman* and *Thomas Haggar*, as on the part " of them the ſaid *Samuel* and *Thomas Rodbard*, indiffer- " ently nominated and elected to award, ordain, adjudge, " and determine of, and upon, and concerning all and all [792] " manner of action and actions, cauſe and cauſes of ac- " tions, ſuits, debts, bonds, bills, ſpecialties, executions, " accounts, ſum and ſums of money, differences, contro- " verſies, treſpaſſes, damages, claims, and demands what- " ſoever at any time before then had, moved, commenced, " proſecuted, done, promiſed, committed, or depending " in ſuit, controverſy, queſtion, or demand, by or between " the ſaid *Thomas Freeman* and *Thomas Haggar* and the " ſaid *Samuel* and *Thomas Rodbard*, for or by reaſon of any " matter, cauſe, or thing whatſoever; ſo that the ſaid ar- " bitrators ſhould make and give their award and deter- " mination of and concerning the premiſes in writing in- " dented under their hands and ſeals, ready to be delivered " to the ſaid *Thomas Freeman* and *Thomas Haggar*, *Samuel* " and *Thomas Rodbard*, or either or any of them, at or in " the manſion-houſe of *Toby Winne* ſcrivener, in a ſtreet " called *Bartholomew Lane*, near the *Royal Exchange*, *Lon-* " *don*, to wit, in the pariſh of St. *Bartholomew Exchange*, " in the ward of *Broadſtreet*, *London*, the ſaid Sir *John* " *Parſons* and *Richard Hammond* the arbitrators afore- " ſaid, having taken upon themſelves the trouble of the " ſaid award, by a certain writing indented under the " hands and ſeals of the ſaid arbitrators, and ready to be " delivered to the ſaid *Thomas Freeman* and *Thomas Hag-* " *gar*, *Samuel* and *Thomas Rodbard*, either or any of them, " did arbitrate, make, and give their award and determin- " ation of and concerning the premiſes, that the ſaid *Sa-* " *muel* and *Thomas Rodbard*, and alſo the ſaid *Thomas* " *Freeman* and *Thomas Haggar*, or the ſeveral reſpective " executors and adminiſtrators of the ſaid *Samuel* and " *Thomas Rodbard*, *Thomas Freeman*, and *Thomas Haggar*, " ſhould mutually ſign and ſeal, and as their act and deed " deliver to and for the uſe of each other, their executors " and adminiſtrators reſpectively, full and ſufficient gene-

To be made in writing before the firſt of December.

Arbitrators make their award.

" ral

" ral releaſes and diſcharges of all actions, ſuits, accounts,
" debts, and demands whatſoever, in law or equity, of or
" concerning the premiſes, to the ſaid arbitrators as afore-
" ſaid in any manner ſubmitted. And the ſaid *Samuel*
" and *Thomas Rodbard* ſay, that they, from the time of
" making the ſaid award, always were and now are ready
" to ſign and ſeal, and as their acts and deeds deliver to
" the ſame *Thomas Freeman* and *Thomas Haggar* ſuch re-
" leaſes and diſcharges, as by the ſaid arbitrators are above
" awarded, if the ſaid *Thomas Freeman* and *Thomas Hag-*
" *gar* ſhould and would be willing to accept thoſe releaſes
" and diſcharges from the ſaid *Samuel* and *Thomas Rod-*
" *bard:* And this they are ready to verify: Wherefore the
" ſame *Samuel* and *Thomas Rodbard* pray judgment, if the
" ſaid *Thomas Freeman* and *Thomas Haggar* ought to have
" or maintain their action aforeſaid thereupon againſt
" them, *&c.*

" To this the plaintiffs demurred, and the defendants
" joined in demurrer."

Pleas before our Lord the King and our Lady the Queen at Weſtminſter, *of the Term of the* Holy Trinity *in the Seventh Year of the Reign of* William *the Third, now King of* England, *&c. Roll* 176. [793]

Bacon *againſt* Debary.

[3 Ld. Raym. Entries 361. S. C.]

London, to wit, " BE it remembered, That heretofore, that is to ſay, in the term of *Eaſter* laſt paſt, be-
" fore the lord the king at *Weſtminſter* came *Joſiah Bacon*
" by *William Baker* his attorney, and brought into the
" court of the ſaid lord the king then there his certain bill
" againſt *David Debary*, otherwiſe called *David Debary* of
" *London*, merchant, in cuſtody of the marſhal, *&c.*, of a
" plea of debt; and there are pledges of proſecuting,
" namely *John Doe* and *Richard Roe;* which ſaid bill fol-
" loweth in theſe words, that is to ſay, *London*, to wit,
" *Joſiah Bacon* complains of *David Debary*, otherwiſe
" called *David Debary* of *London*, merchant, in the cuſtody
" of the marſhal of the *Marſhalſea* of our lord the king,
" before the king himſelf being, of a plea that he render

Salk. 70. Skin. 679. Comb. 439. Carth. 412. Caſes B. R. 129. Holt 78. S. C.

Declaration upon a bond of arbitration.

" to him ſix hundred pounds of lawful money of *England*, " which he owes to him and unjuſtly detains, for that, to " wit, That whereas the ſaid *David*, on the eighth day of " *November* in the year of our Lord one thouſand ſix hun- " dred and ninety-four, at *London*, to wit, in the pariſh of " St. *Mary le Bow* in the ward of *Cheap*, by his certain " writing obligatory, ſealed with the ſeal of the ſame *Da-* " *vid*, which to the Court of the ſaid lord the king is now " here ſhewn, the date of which is the ſame day and year, " acknowledged himſelf to be held and firmly bound to " the ſaid *Joſiah* in the aforeſaid ſix hundred pounds, to " be paid to the ſame *Joſiah* when he ſhould be thereunto " requeſted: Nevertheleſs the ſaid *David*, although often " requeſted, *&c.*, hath not yet paid the ſaid ſix hundred " pounds to the ſaid *Joſiah*, but hath hitherto altogether " refuſed and ſtill doth refuſe to pay the ſame to him, to " the damage of the ſame *Joſiah* of one hundred pounds: " And therefore he brings ſuit, *&c.*

" And now at this day, to wit, *Friday* next after the " morrow of the *Holy Trinity* in this ſame term, until " which day the ſaid *David* had leave to imparle to the " ſaid bill, and then to anſwer, *&c.* before the lord the " king at *Weſtminſter*, comes as well the ſaid *Joſiah* by his " ſaid attorney, as the ſaid *David* by *John Green* his at-
[794] " torney, and the ſame *David* defends the force and in- " jury, when, *&c.*, and prays *oyer* of the writing obliga- " tory; and it is read to him, *&c.*; he alſo prays *oyer* of " the condition of the ſame writing obligatory; and it is " read to him in theſe words, to wit, The condition of " this obligation is ſuch, that if the above-bounden *David* " *Debary*, for and on the behalf of *Jacob Dernyter* of *Ham-* " *borough*, merchant, his executors and adminiſtrators, do " and ſhall well and duly ſtand to, obey, abide, obſerve, " perform, fulfil, and keep the award, arbitrement, order, " final end, determination, and judgment of *Maurice Wil-* " *liams*, *Nicholas Cutler*, and *Michael Milford* of *London*, " merchants, or any two of them, arbitrators, as well on " the part and behalf of the above-named *Joſiah Bacon*, " and by their mutual aſſents and conſents indifferently " elected, named, and choſen to arbitrate, award, order, " judge, determine, and a final end to make of, for, upon, " and concerning all and all manner of action and actions, " cauſe and cauſes of action, ſuits, debts, accounts, reck- " onings, ſum and ſums of money, covenants, contracts, " promiſes, treſpaſſes, damages, bonds, bills, ſpecialties, " judgments, extents, executions, treſpaſſes, ſtrifes, dif- " ferences, controverſies, matters, claims, and demands " whatſoever, as now are, or at any time before the date " above written have been moved, ſtirred up, or depend-

" ing

" ing between the ſaid *David Debary*, as attorney to the " ſaid *Jacob Dernyter* of the one part, and the ſaid *Joſiah* " *Bacon* of the other part, for, touching, or concerning " certain accounts between the ſaid *Joſiah Bacon* and the " ſaid *Jacob Dernyter*, ſo as the ſaid award, arbitrement, " order, final end, determination, and judgment of the ſaid " arbitrators, or any two of them, of and upon the pre- " miſes, be made and ſet down in writing indented under " their hands and ſeals, and be delivered, or ready to be " delivered up unto the ſaid parties reſpectively in differ- " ence, requiring the ſame at or in the now dwelling- " houſe of *John Chambers*, ſcrivener, ſituate in *Lombard-* " *ſtreet*, *London*, on or before the one and twentieth day of " this inſtant *November*; then this obligation to be void, " or elſe to ſtand in full force and virtue; which being " read and heard, the ſame *David Debary* ſaith, that the " ſaid *Joſiah Bacon* ought not to have or maintain his ſaid " action againſt him thereupon; becauſe he ſaith, that No award " the ſaid *Maurice Williams*, *Nicholas Cutler*, and *Michael* pleaded. " *Milford* in the condition aforeſaid named, or two of " them, did not make any award in writing indented un- " der their hands and ſeals, of, for, or concerning the pre- " miſes aforeſaid in the condition aforeſaid above ſpecified, " upon or before the twenty-firſt day of *November* in the " condition aforeſaid mentioned, according to the form " and effect of the ſaid condition: And this he is ready to " verify: Wherefore he prays judgment if the ſaid *Joſiah* " *Bacon* ought to have or maintain his action aforeſaid " thereupon againſt him, *&c.*

" And the ſaid *Joſiah Bacon* ſaith, That he, notwith- Replies an " ſtanding any thing by the ſaid *David Debary* above in award. " his plea alleged, ought not to be precluded from having [795] " his action aforeſaid thereupon againſt him the ſaid " *David*, becauſe he ſaith, that after the making the " writing obligatory aforeſaid, to wit, upon the twenty- " firſt day of *November* in the year of our lord one thou- " ſand ſix hundred and ninety-four, in the ſaid con- " dition ſpecified, at *London* aforeſaid, in the pariſh and " ward aforeſaid, the ſaid *Nicholas Cutler* and *Michael* " *Milford*, two of the arbitrators in the ſaid condition " above ſpecified, took upon themſelves the trouble of " awarding and ordaining of and concerning the premiſes " in the ſaid condition above-mentioned, and made their " award in writing indented under their hands and ſeals " between the parties, and of and concerning the pre- " miſes in the ſaid condition mentioned; by which ſaid " award, produced here in court, the ſame arbitrators, " reciting, That whereas the ſaid *David*, for and on the Award ſet forth. " behalf of *Jacob Dernyter* of *Hamborough*, merchant,

" and

" and the ſaid *Joſiah*, by interchangeable obligations,
" bearing date on the eighth day of *November* then in-
" ſtant, were bound the one to the other in ſix hundred
" pounds, conditioned to ſtand to the award of the ſaid
" *Maurice Williams*, *Nicholas Cutler*, and *Mich. Milford*,
" or any two of thoſe arbitrators, mutually by them
" elected to adjudge, determine, and finally end all and
" all manner of action and actions, cauſe and cauſes of
" actions, ſuits, debts, accounts, reckonings, ſum and
" ſums of money, covenants, contracts, promiſes, treſ-
" paſſes, damages, obligations, bills, ſpecialties, judg-
" ments, extents, executions, quarrels, differences, con-
" troverſies, matters, claims, and demands whatſoever,
" which then were, or at any time before the date of
" the writing obligatory aforeſaid had been moved, ſtirred
" up, or depending between the ſaid *David Debary*, (as
" attorney of the ſaid *Jacob Dernyter*,) and the ſaid *Joſiah*
" *Bacon* touching the accounts between the ſaid *Joſiah*
" *Bacon* and the ſaid *Jacob Dernyter*, ſo that the award
" and determination of the ſaid arbitrators, or of any two
" of them, ſhould be made in writing indented, under
" their or any two of their hands and ſeals, ready to be
" delivered to the ſaid parties in difference, requiring the
" ſame, at or in the then and now dwelling-houſe of
" *John Chambers*, ſcrivener, ſituate in *Lombard-ſtreet*,
" *London*, upon or before the ſaid twenty-firſt day of
" *November*, as by the ſaid obligations and the conditions
" of the ſame more fully appears; the ſaid *Nicholas*
" *Cutler* and *Michael* did award and order the ſaid *David*
" *Debary*, his executors, adminiſtrators or aſſigns, on the
" part of the ſaid *Jacob Dernyter*, to pay or cauſe to be
" paid to the ſaid *Joſiah*, his executors, adminiſtrators
" or aſſigns, the ſum of three hundred and forty-five
" pounds ſix ſhillings and ten pence of lawful money of
" *England*, upon or before the ſecond day of *January*
" then next; and they did further award and ordain, that
" the ſaid *Joſiah Bacon* and the ſaid *David Debary*, on
" the behalf of the ſaid *Jacob Dernyter*, upon the payment
" of the ſaid ſum of money as aforeſaid, ſhould ſign and
[796] " ſeal, and lawfully execute and deliver to or for the uſe
" of each of them a good and ſufficient releaſe of all and
" all manner of action and actions, cauſe and cauſes of
" action, ſuits, debts, accounts, reckonings, ſum and ſums
" of money, covenants, contracts, promiſes, treſpaſſes,
" damages, obligations, bills, ſpecialties, judgments, ex-
" tents, executions, quarrels, differences, controverſies,
" matters, claims, and demands whatſoever touching the
" ſaid accounts, as by the ſaid award appears. And the
" ſame *Joſiah* in fact ſaith, That the ſaid award in form

" aforeſaid made afterwards, to wit, on the ſame twenty-
" firſt day of *November* in the year aforeſaid, at *London*
" aforeſaid, in the pariſh and ward aforeſaid, was deli-
" vered as well to the ſaid *Joſiah* as to the ſaid *David*, Award deliver-
" according to the form and effect of the condition of ed.
" the writing obligatory aforeſaid: And the ſame *Joſiah*
" further ſaith, that although he the ſaid *Joſiah*, from the
" time of making the award aforeſaid, hitherto hath
" well and truly obſerved, performed, and kept all and
" ſingular the matters and things in the ſaid award con-
" tained on the part of him the ſaid *Joſiah* to be per-
" formed and fulfilled according to the form and effect of
" the ſame award; proteſting alſo that the ſaid *David* Proteſtation.
" *Debary* from the time of making the ſaid award hither-
" to hath not obſerved, performed, or fulfilled the award
" aforeſaid in any things to be performed and fulfilled
" according to the form and effect of the ſaid award; the
" ſame *Joſiah* in fact ſaith, that the ſaid *David Debary* Breach aſſigned.
" did not pay or cauſe to be paid to the ſaid *Joſiah* the ſaid
" ſum of three hundred forty and five pounds ſix ſhil-
" lings and ten pence, upon or before the ſaid ſecond
" day of *January*, which he then ought to have paid to
" him, according to the form and effect of the ſaid
" award: And this he is ready to verify: Wherefore he
" prays judgment and his ſaid debt, together with his da-
" mages by occaſion of the detention of that debt, to him
" to be adjudged, *&c.*

" Demurrer and joinder, and judgment for the de-
" fendant."

Pleas before our Lady the Queen at Weſtminſter, *of the Term of* St. Hilary *in the Second Year of the Reign of the Lady* Anne, *now Queen of* England, *&c. Roll* 450. [797]

Winter *againſt* Garlick.

City of *Briſtol*, to wit, " BE it remembered, that heretofore, to wit, " to wit, in the term of *Eaſter* laſt Salk. 75.
" paſt, before our lady the queen at *Weſtminſter* came
" *Edmund Winter* by *Richard Longford* his attorney, and
" brought into the court of the ſaid lady the queen then
" there his certain bill againſt *Edward Garlick*, otherwiſe
" called *Edward Garlick* of the city of *Briſtol*, apothecary,

" in

" in the cuſtody of the marſhal, &c. of a plea of debt;
" and there are pledges of proſecuting, namely, *John Doe*
" and *Richard Roe*; which ſaid bill followeth in theſe
Declaration upon arbitration bond. " words, that is to ſay, city of *Briſtol*, to wit, *Edmund*
" *Winter* complains of *Edward Garlick*, otherwiſe called
" *Edward Garlick* of the city of *Briſtol*, apothecary, in
" the cuſtody of the marſhal of the *Marſhalſea* of the
" lady the queen, before the queen herſelf being, of a
" plea, That he render to him one hundred pounds of
" lawful money of *England*, which he oweth to him, and
" unjuſtly detains, for that, to wit, that whereas the
" ſaid *Edward*, on the nineteenth day of *Auguſt* in the
" thirteenth year of the reign of our lord *William* the
" Third, late king of *England*, &c. at the city of *Briſtol*
" in the county of the ſame city, by his writing obliga-
" tory, ſealed with the ſeal of him the ſaid *Edward*, and
" ſhewn to the Court of the lady the queen now here,
" the date of which is on the ſame day and year, acknow-
" ledged himſelf to be held and firmly bound to the ſaid
" *Edmund* in the aforeſaid one hundred pounds, to be
" paid to the ſame *Edmund*, when he ſhould be thereunto
" afterwards required: Nevertheleſs the ſaid *Edward*,
" although often requeſted, &c. hath not yet paid the
" ſaid one hundred pounds to the ſame *Edmund*, but hath
" hitherto altogether refuſed and ſtill doth refuſe to pay
" the ſame to him, to the damage of him the ſaid *Ed-*
" *mund* of ten pounds: And therefore he brings ſuit, &c.

Plea. " And now at this day, to wit, *Monday* next after eight
" days from the day of St. *Hilary* in this ſame term, until
" which day the ſaid *Edward* had leave to imparl to the
" ſaid bill, and then to anſwer, &c. before the lady the
" queen at *Weſtminſter* comes as well the ſaid *Edmund*
[798] " by his ſaid attorney, as the ſaid *Edward* by *John Tilla-*
" *dam* his attorney; and the ſaid *Edward* defends the
" force and injury when, &c. and prays oyer of the
" writing obligatory aforeſaid; and it is read to him, &c.
" and he prays alſo oyer of the condition of the ſame
" writing; and it is read to him in theſe words, to wit,
" The condition of this obligation is ſuch, that if the
" above-bounden *Edward Garlick*, his heirs, executors,
" and adminiſtrators, for his and their parts and behalf,
" do and ſhall in all things well and truly ſtand to, obey,
" abide, perform, fulfil, and keep the award, order, arbi-
" trement, final end and determination of *John Hinde* of
" the city of *Briſtol* aforeſaid, Gentleman, and *John*
" *Packer* of the ſame city, bell-founder, arbitrators, indif-
" ferently named, elected, and choſen as well on the
" part and behalf of the above-bounden *Edward Garlick*,
" as of the above-named *Edmund Winter*, to arbitrate,
" award,

" award, order, judge, and determine of and concerning " all and all manner of action and actions, cauſe and " cauſes of action, ſuits, bills, bonds, ſpecialties, judg- " ments, executions, extents, quarrels, controverſies, treſ- " paſſes, damages, and demands whatſoever, at any time " or times heretofore had, made, moved, brought, con- " ſented, proſecuted, done, ſuffered, committed, or de- " pending by and between the ſaid parties, or either of " them, ſo as the ſaid award be made in writing, and " ready to be delivered to either of the ſaid parties requir- " ing the ſame, on or before the eighth hour in the after- " noon of this preſent day; but if the ſaid arbitrators do " not make ſuch their award of and concerning the pre- " miſes by the time aforeſaid, that then if the ſaid *Ed-* " *ward Garlick*, his executors and adminiſtrators, for his " and their parts and behalfs, do in all things well and " truly ſtand to, obey, abide, perform, fulfil, and keep " the award, order, arbitrement, umpirage, final end, and " determination of *Robert Godfrey*, Gentleman, of and " concerning the premiſes, ſo as the ſaid umpire do make " his award or umpirage of and concerning the premiſes " in writing, and ready to be delivered to either of the " ſaid parties requiring the ſame, on or before the eighth " hour in the afternoon of the day next enſuing the " date of theſe preſents, then this obligation to be void, " or elſe to remain in full force, ſtrength, and virtue; " which being read and heard, the ſame *Edward* ſaith " that the ſaid *Edmund* ought not to have or maintain his " action aforeſaid thereupon againſt him: Becauſe he " ſaith that the aforeſaid *John Hinde* and *John Packer*, the " arbitrators in the condition aforeſaid named, made no " award, order, arbitration, concluſion, final end, or de- " termination of and in the premiſes in the ſaid condition " above-mentioned, at or before the eighth hour in " the afternoon of the ſaid nineteenth day of *Auguſt* " in the thirteenth year aboveſaid, being the day of " the date of the writing obligatory aforeſaid: But the " ſame *Edward* further ſaith, that the aforeſaid *Robert* " *Godfrey* the umpire in the ſame condition likewiſe " named, having taken upon himſelf the burden of ar- " bitrating of and concerning the premiſes in the ſaid " condition above ſpecified, afterwards and before the " eighth hour in the afternoon of the day next following " the date of the writing obligatory aforeſaid, in the " ſame condition ſpecified, to wit, at the eighth hour in " the forenoon of the ſame day, at the city of *Briſtol* " aforeſaid in the county of the ſame city, made his um- " pirage in writing of and concerning the premiſes " aforeſaid, then and there ready to be delivered to the " parties

Pleads no award made by the arbitrators, but that the umpire did.

[799]

The umpirage ſet forth that the

defendant ſhould pay coſt of ſuit.

" parties aforeſaid in manner and form following; that is " to ſay, that all ſuits at law then depending between " the aforeſaid parties ſhould ceaſe, and be no further " proſecuted; and that the ſaid *Edward Garlick* ſhould " pay to the ſaid *Edmund Winter*, at the then dwelling- " houſe of *Samuel Fitſall*, ſituate in *Caſtle-ſtreet* in *Briſtol* " aforeſaid, the ſum of ten ſhillings, and the coſts of law " which the ſaid *Edmund Winter* had been at in that " ſuit; and that after the payment of the ſaid ſum of ten " ſhillings in manner aforeſaid, they the ſaid *Edmund* " *Winter* and *Edward Garlick* ſhould give to each other " general releaſes of all actions, ſuits, controverſies, and " demands from the beginning of the world to the nine- " teenth day of the then inſtant *Auguſt*, in common form; " and the ſame *Edward* further ſaith, that after making " the umpirage aforeſaid, and before the day of exhibit- " ing the ſaid bill of the ſaid *Edmund*, to wit, on the " twenty-firſt day of *Auguſt*, in the thirteenth year afore- " ſaid, at the ſaid dwelling-houſe of the ſaid *Samuel Fitſall*, " ſituate in *Caſtle-ſtreet* in *Briſtol* aforeſaid, he the ſame

Tender and refuſal.

" *Edward* was ready, and offered to pay to the ſame *Ed-* " *mund* then and there being preſent the ſaid ten ſhil- " lings, and to ſeal, and as his deed to deliver to the " ſame *Edmund* a written general releaſe of all actions, " ſuits, controverſies, and demands, from the beginning " of the world unto the ſaid nineteenth day of *Auguſt*, in " the umpirage aforeſaid mentioned, in common form; " but the ſaid *Edmund* then and there altogether refuſed " to receive or accept the ſaid ten ſhillings and the ſaid " written releaſe from the ſaid *Edward*: And this he is " ready to verify: Wherefore he prays judgment if the " ſaid *Edmund* ought to have or maintain his ſaid action " thereupon againſt him, *&c.*

Replies and ſets forth the cauſe of action, and levying a plaint.

" And the ſaid *Edmund* ſaith, that he, notwithſtanding " any matters by the aforeſaid *Edward* above in his plea " alleged, ought not to be precluded from having his ſaid " action thereupon againſt him, becauſe he ſaith that the " ſaid *Edward*, before the ſaid time of making the writ- " ing obligatory aforeſaid, at the city of *Briſtol* aforeſaid, " in the county of the ſame city, and within the juriſdic- " tion of the Court of our ſaid late lord the king, held at " his ſaid city of *Briſtol* before the mayor and aldermen " of the ſame city, falſely and maliciouſly had ſaid and " publiſhed, concerning the ſame *Edmund*, divers falſe, " feigned, ſcandalous, and malicious words; and the ſame " *Edmund*, for the obtaining and recovering damages by " occaſion of the ſpeaking and publiſhing of thoſe words, " before the ſaid time of making the writing obligatory

[800] " aforeſaid, levied in the ſaid court of the ſaid late lord

" the

" the king, held at the city of *Briſtol* aforeſaid before the
" mayor and aldermen of the city aforeſaid, a certain plaint
" againſt the ſaid *Edward* of a plea of treſpaſs upon the
" caſe, and thereupon ſuch proceedings were had, that
" he the ſame *Edmund*, at the city of *Briſtol* aforeſaid, in
" the county of the ſame city, paid, expended, and laid
" out, in the proſecution of the aforeſaid plaint againſt
" the ſaid *Edmund*, the ſum of four pounds five ſhillings
" and ten pence of lawful money of *England*, and there-
" upon the ſame *Edmund* and *Edward* for the determina-
" tion of that ſuit, and all other demands whatſoever, af-
" terwards, to wit, on the ſaid nineteenth day of *Auguſt*
" in the thirteenth year of the reign of the ſaid late lord
" the king aboveſaid, at the city of *Briſtol*, in the county
" of the ſame city, by their ſeveral writings obligatory, by
" each to the other of them mutually ſealed and deliver-
" ed, ſubmitted themſelves to perform and fulfil the award
" of the aforeſaid *John Hinde* and *John Packer*, or for
" want thereof the umpirage of the aforeſaid *Robert God-*
" *frey*, that is to ſay, the ſaid *Edward* by his writing ob-
" ligatory in the ſaid declaration above mentioned; and
" the ſame *Edmund* in fact ſaith, that he the ſaid *Edmund*,
" after the making of the umpirage aforeſaid by the ſaid
" *Robert*, and before the day of exhibiting the ſaid bill of
" the aforeſaid *Edmund*, to wit, on the ſaid twenty-firſt
" day of *Auguſt* in the thirteenth year of the reign
" of the ſaid late king aboveſaid, at the city of *Briſtol*
" aforeſaid in the county of the ſame city, did give no-
" tice to the ſaid *Edward*, that he the aforeſaid *Edmund*
" in proſecution of the ſaid ſuit had paid and expended
" the aforeſaid ſum of four pounds five ſhillings and ten
" pence, and then and there demanded that money of
" the ſaid *Edward*; and that the ſaid *Edward* at any
" time hitherto hath not paid the ſaid four pounds five
" ſhillings and ten pence to the ſame *Edmund*, accord-
" ing to the form and effect of the umpirage aforeſaid:
" And this he is ready to verify: Wherefore he prays
" judgment, and his debt aforeſaid, together with his
" damages by occaſion of the detention of that debt, to
" him to be adjudged, *&c.*

" Demurrer and joinder."

Averment of his expence in the ſuit.

And their ſubmiſſion to the award by the ſaid bond.

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THE

THE

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27. Where a ſtatute gives a right, the common law gives an action to recover it 415
28. Where two joint merchants are, and one dies, the action ſurvives to the other, but not the duty or intereſt 444
29. Where one releaſes his right he cannot purſue his action or remedy: But if he has a right and ſeveral remedies, the diſcharge of one does not diſcharge the other 422
30. At common law all actions were to be laid in the proper county, that the jury might be *de vicinete* 688

Action on the Caſe.

1. If one undertakes to do a thing without hire or reward, no action lies for the nonfeaſance 26
2. But *e contra* where he enters upon the doing it, and any misfeaſance be through his neglect or miſmanagement *ibid.*
3. As where one aſſumes to take up a hogſhead of wine in one cellar and lay it down in another, and lays it down ſo negligently that it is ſtaved, *&c.* *ibid.*
4. It lies not by particular perſons for a public nuiſance without ſpecial damage (but indictment, *&c.* does) 12, 16
5. As where a common ferry is at *L.* for the inhabitants to paſs toll-free, an action lies for taking toll, but not for keeping up the ferry 12
6. It lies for not repairing the partition-wall of a privy, *pro defectu*

cujus filth ran into the plaintiff's cellar *Page* 22, 360
7. It lies by the owners for arreſting a ſhip by proceſs of the Admiralty *infra corp. com.* whereby his voyage was loſt 31
8. But for ſtopping a way leading to the plaintiff's colliery with intent to deprive him of the profits, *&c.* though a ſpecial damage was ſhewn, the Court were divided 16, 17
9. For it is not ſufficient to ſay cuſtomers would not come, but muſt ſhew they were coming and were hindered thereby 17
10. Lies not by a burgeſs againſt a conſtable for refuſing to take his vote for a parliament man, *per* 3 *contra Holt* 19, 20
11. Nor againſt an officer for a falſe return to parliament, but on the ſtatute 7, 8 *W.* 3. *vide* 21, 503, 504
12. Nor againſt a poſtmaſter for exchequer bills loſt out of a letter delivered at the poſt-office; *per* 3 *contra Holt* 17
13. But *per Holt*, an officer is reſponſible both for himſelf and deputies, whether his truſt ariſe by the common law, *or* by ſtatute 18
14. As innkeepers, carriers, *&c*, taking rewards, are anſwerable for thoſe that act under them *ibid.*
15. And whoever takes a public employment is bound to ſerve the public, *&c.* therein *ibid.*
16. And a deputy is alſo chargeable as a wrongdoer, and his act may forfeit the office of the principal *ibid.*
17. It lies by an executor againſt an officer for a falſe return of a *fi. fa.* in the teſtator's lifetime within 4 *E.* 3. *c.* 7. 12
18. For by the execution, a right was veſted in the teſtator, & *non moritur*, *&c.* *Contra* of meſne proceſs *ibid.*
19. It lies for negligently keeping his fire in a field, whereby another's corn is burnt, or other damage done 13
20. But not for negligently keeping fire, *&c.* againſt a leſſee at will, by a leſſor ſeiſed in fee 19
21. *Secus* if the leſſor has only a term for years or life, or if a ſtranger is damnified *Page* 19
22. If a leſſee aſſigns his whole term, and the aſſignee burns the houſe by negligence, that action lies not 13
23. *Contra* where he aſſigns only part thereof, and it appears he has a reſiduary intereſt *ibid.*
24. It lies where a perſon not concerned, procures one to ſue another without cauſe 14, 15
25. So for maliciouſly cauſing one to be indicted, whereby he is damnified either in perſon, reputation, or property *ibid.*
26. As for maliciouſly cauſing, *&c.* *per quod* he was put to great expence, though the indictment was inſufficient 15
27. So for maliciouſly cauſing one to be indicted of a riot, *&c.* after acquittal by verdict 13
28. But *nolle proſequi* is not ſufficient evidence to maintain a declaration in caſe of ſuch acquittal 21
29. It lies not by an adminiſtrator under the king's letters patent, for maliciouſly putting in caveats, *per quod*, *&c.* 13
30. Nor for bringing an action where nothing is due, without ſome ſpecial collateral wrong, which muſt be ſhewn 14
31. In caſe for maliciouſly holding to ſpecial bail, the declaration ought to ſhew the ſum due, and the proceſs ſpecially, and that the action is determined 15
32. Where the grantee of eſtovers may have *caſe* againſt the grantor, and where *treſpaſs*, vide 638

Action of the Caſe on *Aſſumpſits.*

1. *Indebitatus aſſumpſit* lies in no caſe but where debt lies 23
Vide n. . ibid.
2. But where one receives money to another's uſe, it lies againſt the receiver 24, 27, 28
3. And where one pays money by miſtake on an account, or by any mere deceit, he may have this action 22

4. But not where it is paid knowingly upon an illegal conſideration *Page* 22
5. *Ergo* not where money is paid by an obligor upon any uſurious bond. *Vide* note to this caſe *ibid.*
6. Nor for money delivered to a ſolicitor, *&c.* to bribe cuſtom-houſe officers, *&c.* and laid out accordingly *ibid.*
7. It lies for one that pays money on a policy of inſurance, believing the ſhip loſt when it is not 22
8. It lies on a promiſe to pay ſo much new money in conſideration of ſo many pieces received of old money 25
9. So, on a promiſe to pay 50*l.* in conſideration of a note of 50*l.* under a third perſon's hand, delivered by the plaintiff to the defendant *ibid.*
10. For the note being evidence of a debt due, the parting with it is a good conſideration 25
11. So, in conſideration that the plaintiff would receive *A. &c.* into his houſe *ut hoſpites*, and find them meat, *&c.* with an averment that he did receive, *&c.* though not ſaid *ut hoſpites* *ibid.*
12. So in conſideration the plaintiff would accept the defendant to be his debtor inſtead of *A.* with averment that he did accept, *&c* and held good after verdict, though no expreſs averment that *A.* was diſcharged 29
13. But not againſt *B.* for money lent *A.* at *B.*'s requeſt, becauſe the promiſe is only collateral 23
If a perſon for whoſe uſe goods are furniſhed is liable at all, the parol undertaking of another perſon is void, n. 28
14. Yet it lies againſt a ſtranger on his promiſe to pay the debt if the officer would reſtore goods taken on a *fi. fa.* 29
15. It lies on a conditional promiſe, as, Prove it, and I will pay you; if ſued within ſix years 23
Or, on an acknowledgment *the promiſe of one joint debtor binds the others. What is a ſufficient promiſe or acknowledgment is a queſtion for the jury*, n. *Page* 23
16. It lies by an executor againſt one that receives money by order of an adminiſtrator, *i. e.* after adminiſtration repealed (*contra* n.) 27
17. So by an executor on a promiſe to himſelf for a debt to the teſtator, if he declares accordingly 28
18. But if he declares on a promiſe to the teſtator, and the ſtatute of limitations is pleaded, he cannot give in evidence a promiſe to himſelf *infra ſex annos (the plaintiff on ſuch plea allowed to amend*, n.) ibid.
19. *A.* living a former wife, marries *B.* and receives her rents, *&c. B.* may have *indeb. aſſumpſit* againſt *A.* for ſo much money received to her uſe 28
General rules and ſeveral caſes relative to actions for money had and received, n. ibid.
20. It lies where in conſideration the plaintiff promiſed to marry the defendant, ſhe promiſed to marry him, becauſe mutual promiſes 24
Of caſes relative to promiſes of marriage, n. ibid.
21. But if the promiſe be on one ſide only, or if that on either ſide is not binding, the whole is *nudum pactum* *ibid.*
22. If one aſſumes, *&c.* as action on the caſe, *Numb.* 3. and ſee *Baron* and *Feme*, *Numb.* 8.

See alſo *Bills of Exchange*, and *Quantum meruit*. And for Actions on the Caſe for Words, vide *Words*.

Actions Popular.

1. An action *qui tam* on a penal ſtatute will not lie againſt an attorney of *C. B.* in any other court 30
2. For an informer cannot ſue where he pleaſes, though the king himſelf may *ibid.*
3. And proſecutors *qui tam* are looked on as common informers *ibid.*
4. Where a ſtatute gives a penalty to a ſtranger, and he ſues, he is a common informer, and ſhall pay coſts on 18 *El. c.* *ibid.*

5. But where it is to the party grieved he is not a common informer, nor liable to coſts by that ſtatute *Page* 30

Reſpecting penal and qui tam *actions*, n. ibid.

6. All popular actions on penal ſtatutes made before 21 *Jac.* 1. *c.* 4. muſt be brought and proſecuted in the proper county 373

Additions.

1. Addition of place, &c. is not neceſſary in a writ of *homine replegiando* on the ſtatute 1 *H.* 5. *c.* 5. 5, 6

2. Nor in any caſe where proceſs of outlawry lay not at common law 5

3. *Ergo* not in replevin where ſuch proceſs is only given by ſtatute 25 *E.* 3. *c.* 17. Q. ibid.

4. And the ſtatute 1 *H.* 5. touching additions, is to be conſtrued ſtrictly ibid.

5. *Ergo* it extends not to a *novel diſſeiſin* (or other mixed action), though the king ſhall have a fine, and exigent lies ibid.

6. And *original writ* in that ſtatute intends ſuch original as the Court proceeds on ibid.

7. *Ergo* not *vicountiels*, as replevins, &c. where the proceedings are only on the *pluries* ibid.

8. And where the addition is not in the firſt writ, if it be in the ſecond or the *pluries*, it vitiates the writ 6

9. Any matter that diſtinguiſhes the perſons makes the addition of *ſenior* and *junior* unneceſſary 7

10. As where there are two *A. B's.* and the writ is againſt *A. B. in cuſtod. mar.* it is well, except ſhewn that both are in *cuſtod. mar.* ibid.

11. And where no ſuch addition is, the father (or *ſenior*) is *prima facias* intended ibid.

12. A peer's eldeſt ſon cannot in legal proceedings have the addition of his father's ſecond title, though ſuch addition is allowed him in common parlance 451

Adminiſtrations, &c.

1. Who may grant adminiſtrations. Every ordinary and peculiar may *Page* 40

2. And every peculiar is an ordinary for this purpoſe: *And for the* nature and kinds of peculiars 41

3. Adminiſtration originally belonged to the biſhop. and *Henſie's* caſe in 9 *Co.* decided Q. 37

4. It may be granted by the king, for he is ſupreme ordinary 41

5. Where granted by the lord of a manor, and how to declare thereupon ibid.

6. *Narr.* upon adminiſtration granted *per officiat. peculiar.* &c. *debito modo commiſſa*, is good. *Jure* averment that he had juriſdiction of adminiſtrations 3

7. For where one grants adminiſtration *virtute officii*, the plaintiff need not aver his authority; *aliter* if by ſpecial commiſſion 41

8. So in *narr.* by an adminiſtrator, want of alleging by whom committed is cured by pleading *non eſt factum*, or any plea in chief 37, 38

9. But ill on demurrer, for it might be by a peculiar; and then it muſt be averred, *cui adminiſtrationis commiſſio de jure pertinuit*, &c. 38

10. To a *narr.* on adminiſtration committed *per Ep. L.* plea that he was reſident in another diocele *tempore mortis*, is a good bar 37

11. Where one has two houſes in divers dioceſes it ſhall be granted by the ordinary where he died (Q. if *bon. notab.*) ibid.

The deciſion in this caſe was, that a ſimple contract debt is aſſets where the debtor *(who had two houſes) was commorant at the death of the* debtor, n.

12. Where *bon. notab.* are in ſeveral dioceſes in the ſame province, the archbiſhop thereof muſt grant adminiſtration 39

13. But where in one dioceſe in one province, and in another dioceſe in another province, each biſhop muſt grant it ibid.

14. Admi-

14. Adminiſtration granted in *Dorſet* gives no title to adminiſter a judgment had in any court in *Weſtminſter* *Page* 40
15. Adminiſtration is void if granted by a wrong ordinary, but voidable only if granted to a wrong perſon 38
16 If the inteſtate dies *ſans* kindred, the property is in the ordinary till adminiſtration granted 37
17. And in that caſe the ordinary might diſpoſe *in pios uſus*, except letters patent procured as uſual *ibid.*
18. Where a perſon dies inteſtate, the ordinary ſhall commit adminiſtration by ſtat. 31 *E.* 3. *c.* 11. 41
19. Spiritual Court may grant adminiſtration to which they will of kindred in equal degree 38
20. Or part to one and part to another; but of an entire debt it muſt be to one only 36
21. Adminiſtration was granted to the *grandmother*, and a *mandamus* prayed to the Spiritual Court by the *aunt*, but denied 38
22. Adminiſtration of the wife's goods muſt be granted to the huſband only 36
23. But of the huſband's goods, it may be either to the wife or next of kin, *&c.* *ibid.*
24. A man marrying a *feme* executrix, *&c.* the adminiſtration is devolved on him; and he may bring *aſſumpſit* on a promiſe to himſelf without the wife 117
25. Adminiſtration cannot be granted where there is a will and executor, though the will be concealed or the executor refuſe 301
26. Nor can it be granted though the executor becomes bankrupt, *&c.* *contra* if he becomes *non compos* 36
27. Where it is committed to a debtor the action is only ſuſpended (vide *Executors*) 303
28. And if to an obligor, though he has a right to receive, and is to pay the money himſelf, it is no extinguiſhment 306
29. Alſo ſince the ſtatute 22 *Car.* 2. an adminiſtrator is bound to account without citation 315
30. And one entitled to a diſtribution by that ſtatute may ſue an adminiſtrator to prove his account *Page* 316
31. But a creditor cannot ſue the adminiſtration-bond for nonpayment of a debt, for the ſtatute does not extend to it *ibid.*
32. Adminiſtration granted *durante minoritate* of an adminiſtrator ceaſes not till 21. But of an executor it ceaſes at 17 39
33. Adminiſtration may be granted during the abſence of *B.* but the declaration muſt aver that *B.* is abſent 42
34. The cauſe of action accrues to the adminiſtrator from the time of adminiſtration granted 421
35. For if *A.* receives the intereſt money, and afterwards adminiſtration is granted to *B.*, *B.* has ſix years from the adminiſtration granted to bring his action (*contra* of an executor *vide* 21) *ibid.*
36. Yet if he conſents to the defendant's retaining a chattel before, he cannot have trover after adminiſtration granted, *per* 2 *contra* *Holt* 295
37. If ſued as executor, he may plead he is adminiſtrator, and need not traverſe that he intermeddled before adminiſtration granted 298, 317
38. But where ſued as adminiſtrator, if he pleads he is executor, he muſt alſo traverſe the dying inteſtate 297
39. Where an adminiſtrator is charged as aſſignee, the judgment is *De bonis propriis* 309
40. But where charged as adminiſtrator, though he might have been charged as aſſignee, it is only *De bonis teſtatoris* 316
41. A judgment againſt him as executor may be pleaded in bar to another action brought againſt him as adminiſtrator 296
42. On a writ of inquiry, after an interlocutory judgment revived by *ſci. fa.* on 8, 9 *W.* 3. the final judgment muſt be againſt the adminiſtrator and not the inteſtate 42
43. Adminiſtrator under letters patent cannot have *caſe* for maliciouſly hindering him, by putting in *caveats*, *&c.* 37

44. An adminiſtrator impowers *A.* to receive the inteſtate's debts, but a will appearing the adminiſtration is repealed; the executor may have *aſſumpſit* againſt *A.* as for money received to his uſe *Page* 27

See alſo *Executors.*

Admiralty.

1. Mariners wages due by parol, are ſuable there, though the contract on land 31
2. *Aliter* if due by deed or ſpecial agreement *ibid.*
3. The mate of a ſhip may ſue the maſter thereof there for his wages 33
4. But the maſter cannot ſue there on his contract with the owners *ibid.*

Mate becoming maſter during the voyage allowed to ſue in the Admiralty for wages in the firſt capacity, and denied in the laſt, n. ibid.

5 So where an executor of a maſter ſued there for the maſter's wages, a prohibition was granted *ibid.*
6. For though ſuit there for mariners wages is allowed by mere indulgence, yet it never was for the maſters *ibid.* and 424
7. By their law every contract with the maſter implies an hypothecation of the ſhip 34
8. But not ſo by the common law without an expreſs agreement *ibid.*

The maſter has a right to hypothecate for neceſſaries or repairs at ſea or in a foreign country; but perſons ſupplying the ſhip with neceſſaries within the realm, or the maſter paying for ſuch neceſſaries, have no lien, n. ibid.

9. And the maſter by their law may hypothecate the goods as well as the ſhip *ibid.*
10. And on ſuch hypothecation the maſter is ſuable there, but not the owners 35

Either the maſter or owners may be ſued for repairs, unleſs there is a ſpecial contract. The Court of Admiralty has juriſdiction of an hypothecation under ſeal made beyond ſea, n. *Page* 35

11. The ſtatute of limitations is pleadable there to a ſuit for ſeamen's wages 424
12. Where it has juriſdiction their ſentences bind, and common law courts muſt obſerve their determinations 32, 33

The Prize Court in the Admiralty has excluſive juriſdiction of all queſtions relative to captures by ſea or land, n. ibid.

13. Though the Admiralty Court deny a copy of the libel, yet no prohibition till appearance. *Contra* of the Spiritual Court 553
14 Prohibition cannot be granted to try the validity of their proceſs for appearance, before libel or appearance 35
15. But if their proceſs be in nature of an execution, prohibition may be before appearance 31, 35
16. In a ſuit there the principal died before ſentence, and they proceeded on the ſtipulation againſt the ſureties. *Quere* if a prohibition may be 33
17. See before, in Actions of the Caſe. Caſe lies by the owner of a ſhip for arreſting her by admiralty-proceſs, *&c.* 31

See alſo *Maſter and Servant, poſt.*

Adowſon, vide *Preſentation,* and *Quare Impedit.*

Affidavits, vide *Oaths.*

Age.

1. The minority of an executor ceaſes at the age of 17. But of an adminiſtrator not till 21 39
2. The age for making a will to diſpoſe of goods, chattels, and perſonal eſtate, may be at 14 *ibid.*
3. But lands cannot be diſpoſed by will till the age of 21 44
4. Yet if one be born 1 *Feb.* at eleven at night, he may make his will of lands at one in the morning on the laſt of *January* in his 21 year

21 year, becauſe the laſt day of his full age is then begun *Page* 44

Agreement and Diſagreement.

1. An agreement may be either by record or by deed, or by parol (vide *Preſentation)* 33
2. A policy of inſurance altered by agreement after it was underwritten, yet good 444
3. And in ſome caſes a parol agreement may avoid a writing if made at the ſame time 445
4. A goldſmith's note, or bill of exchange, not to be taken as caſh, except ſo expreſsly agreed by the receiver 124, 442
5. See what agreements are good on parol leaſes for tithes, &c. 414, 657

See alſo *Bargain and Sale of Goods.*

Aiders, vide *Principal and Acceſſary.*

Alehouſes.

1. To forfeit 10 *s.* to the poor if they permit any inhabitant to ſit tippling above an hour 45
2. Before 5, 6 *Ed.* 6. any perſon might keep an alehouſe *ſans* licence, being a lawful means of living *ibid.*
3. But if diſorderly kept it was indictable as a nuiſance, and by that ſtatute two juſtices *(quor. unus)* may ſuppreſs it *ibid.*
4. And none are now to keep alehouſes unleſs licenſed and recognizance given *ut ibid.* *ibid.*
5. And if any does, he may be committed for three days, and bound with ſureties to appear at the ſeſſions *ibid.*
6. That ſtatute does not extend to inns being for entertaining travellers, unleſs they degenerate to alehouſes 45
7. But one that keeps an unlicenſed alehouſe is not to be indicted, becauſe puniſhable by the ſtatute otherwiſe *ibid.*
8. See there the difference between ſuppreſſing a licenſed and unlicenſed alehouſe *Page* 45, 46
9. The ſeſſions cannot ſuppreſs an *alehouſe* licenſed by two juſtices 470, 471

Aliens and Denizens.

1. *Turks* and *Infidels* are not *perpetui inimici* to us, &c. and Juſtice *Brook*'s opinion denied 46
2. For though they differ from us in religion, that does not oblige us to be enemies to their perſons *ibid.*
3. They are the creatures of God, of the ſame ſpecies with us, and it is a ſin to hurt their perſons *ibid.*
4. If an *alien enemy* come hither *ſub ſalvo conductu*, he may maintain an action *ibid.*
5. So may an *alien amy* that lives here under the king's protection, though a war afterwards happen between the two nations *ibid.*
6. So an alien enemy that lives here in peace under protection, may ſue a bond, &c. *ibid.*
7. For ſuing is but a conſequential right of protection; *aliter* of one commorant beyond ſea *ibid.*
8. Alſo, the feme covert of an alien enemy, ſhe living here under protection is chargeable as a feme ſole 116

Allegiance, vide *Laws.*

Amends, vide *Tender*, &c.

Amendment.

1. While the declaration, &c. is in paper, the Court may amend at pleaſure, becauſe not within the ſtatutes of amendments 47, 520
2. But when it comes to be in parchment, the Court can mend no further than thoſe ſtatutes allow, for it is then a record *ibid.*
3. Stat. 24 *E.* 3. *c.* 6. and 8 *H.* 6. *c.* 12, 13. are the only ſtatutes of amendments, the others are ſtatutes of jeofails 51
4. Declaration, &c. cannot be amended on demurrer, after entry on the roll 59

5. But

5. But on a plea to the right, or in abatement, it may be reaſonable to amend *Page* 50
6. Yet declaration againſt *J. G.* Knt. on a plea in abatement that he is Knt. and Bart. denied to be amended *ibid.*
Vide ſeveral caſes contra, n. *ibid.*
7. A judgment entered on the plea-roll was amended by the paper book ſigned by the Maſter *ibid.* and 51
8. Variance between the writ of error and the record refuſed amendment, though the curſitor's note was right 49
9. For a writ of error is a commiſſion to the judges, and the Court cannot amend their own commiſſion *ibid.*
10. At common law no difference as to amendments between civil and criminal caſes; *contra per ſtat.* 47, 51
11. A writ of covenant for a fine, being an original, is not amendable by common law or ſtatute 52, 53
12. No difference *quoad hoc* between actions amicable and adverſary, and 5 *Co.* 45. *Gage's* caſe denied 53
13. Variance between the *ſcire fa.* and the judgment not amendable, *&c. vide bis* 52
14. Where the *niſi prius* roll may be amended by the plea-roll, and where not 58, 49
15. *Venire ret.* 23 *Octob. Diſtringas* teſted 24, a diſcontinuance, and not amendable 51
16. In the *diſtringas* the day of *niſi prius* was appointed after the day in bank, and after verdict held not amendable by the plea-roll; becauſe the judges authority was confined to that day *(vide note)* 48, 49
17. Ejectment againſt ſeven, all join in the common rule, and the iſſue was right in the plea-roll, *&c.* But the *niſi prius* roll was againſt five only, and after verdict *pro quer.* this amended by adding the two others 48
18. A demiſe in ejectment laid 1697 for 96, not amendable after verdict, becauſe it would be another title *Page* 48
19. A verdict either general or ſpecial may be amended by the clerk of aſſizes notes in civil caſes, but not in criminal 47, 53
20. A ſpecial verdict has been amended by the notes of the counſel in the cauſe, and that after error brought 47, 53
21. An information may be amended after plea pleaded, and *per Holt* after the record ſealed up *Q.* 47
22. A plea to indictment of murder amended, after replication and before entry on the roll *ibid.*
23. An information of forgery amended in ten places (not material) without coſts or imparlance 50
24. If a record in *B. R.* be amended by the record in *C. B.* the coſts (if any) muſt be given below 49
25. A *diſtringas* with a blank for *debiti, i. e.* the cauſe of action, amended after verdict, as no *diſtringas* 454
26. For, want of a *diſtringas* or no *diſtringas* is aided by verdict; *contra* of an ill *diſtringas ibid.*
27. If the plaintiff moves to amend his declaration the ſame term the defendant's plea comes in, he need not give new rules to plead 520
28. After a plea to iſſue or demurrer joined, while in paper only, the party may amend his plea, or waive his demurrer *ibid.*
29. See an appeal amended by ſtriking out of the count *per attornatum ſuum* 64
30. After judgment by default, and error brought, the declaration was amended by the warrant of *attorn.* on the top of the roll 88

Amerciaments, V. *Fines* & 54.

Amicus Curiæ. Vide 78, 447, 448.

Ancient Demeſne.

1. Tenants in ancient demeſne are free as to their perſons, but not their eſtates 57
2. The privileges ariſe from the conſtitution

ſtitution and nature of the thing coeval with the government itſelf *Page* 57
3. They are ſuppoſed to commence by act of parliament; for they cannot now be created by grant *ibid.*
4. When triable by the record of *Domeſday-Book*, and when by the country *ibid.*
5. Ancient demeſne is land under the title of *terra regis* in that book, and none other *ibid.*
6. Ancient demeſne lands held of a manor in ancient demeſne, are only impleadable in the lord's court there 56
7. But where parcel of the manor only is ancient demeſne, there the particular lands may be impleaded in the king's court *ibid.*
Ancient demeſne can only be pleaded upon a full affidavit. It is not a good plea if the leſſor of the plaintiff only claims a term, n. ibid.
8. By a recovery at common law, ancient demeſne becomes frank free, until reverſed 57
9 Deceit lies for levying a fine of ancient demeſne lands 210

Annuity and Penſion.

1. The king cannot grant an annuity to charge his perſon, for his perſon is not chargeable therewith, though a ſubject is 58
2. But he may grant it out of his exciſe or other branch of his revenue, which ſhall be charged therewith *ibid.*
3. A penſion out of an appropriation, though by preſcription, is ſuable in the Spiritual Court 58
4. For it could not begin but by the grant and inſtitution of ſpiritual perſons *ibid.*
5. And whether granted by the biſhop's ordinance, or by his concurrence with the patron, the church itſelf is charged *ibid.*
6. Yet ſuch annuity, &c. cannot be releaſed to the ordinary, becauſe it is temporal *ibid.*

Appeal.

1. The plaintiff in appeal of murder, &c. muſt count in perſon, and cannot by attorney *Page* 62, 64
2. And if he be not preſent, he may be demanded and nonſuited *ibid.*
3. Yet ſuch nonſuit is not peremptory, becauſe before appearance *ibid.*
4. An appeal is to be arraigned in *French*; but the roll delivered in is to be in *Latin* *ibid* and 61
5. But though it muſt be commenced in perſon, it may be proſecuted by attorney, unleſs where wager of battail lies 62
6. And as the plaintiff cannot count, neither can the defendant therein appear or plead by attorney 59
7. *Nul tiel* pariſh is a good plea therein, but not pleadable by attorney *ibid.*
8. The pariſh may be named and not the vill; for a pariſh is not intended to contain more than one vill (Q.) *ibid.*
9. Erroneous proceſs therein is aided by the defendant's appearance and pleading to iſſue *ibid.*
10. *Aliter* where he challenges the defect by demurring in abatement, &c. *ibid.*
11. And ſee No. 1. *ib.* That an adjournment after a void plea received diſcontinues the appeal *ibid.*
12. What is ſufficient certainty in a count on an appeal 60
13. On an appeal of murder the party may be bailed by *B. R.* though convicted of manſlaughter 61, 62
14. And on ſuch conviction may be allowed his clergy, but ſhall not be diſcharged thereupon 61
15. For his recognizance is to ſtand till he has diſcharged the appeal by *ſci. fa.* againſt the appellant *ibid.*
16. And ſee there the proceeding on ſuch *ſci. fa.* and the arraigning of the appeal thereon *de novo* *ibid.*
17. Though the appeal was put *ſine die*, yet no diſcontinuance, for the *certiorari* continues it 62
18. Said, an appeal either by writ or bill, is always arraigned on the plea

plea ſide, unleſs it comes in by *certiorari*, and then on the *crown-ſide* *Page* 62
19. The recognizance for bail in appeal may be either to the king, or appellant, but beſt to the king 61
20. See the manner of pleading the former conviction, &c. on arraigning the appeal *de novo* *ibid.*
21. And that a conviction of manſlaughter is a good bar therein, though clergy not had by default of the Court 63
22. In a writ of appeal, want of fifteen days *inter* the *teſte* & *ret.* cured by pleading in chief *ibid.*
23. See the caſe of an infant ſuing an appeal by guardian, and the under-ſheriff committed and fined for delivering the writ to him 176, 177

Appearance.

1. Formerly, though a writ was not returned, yet the defendant might appear at the day, either to ſave a penalty or his inheritance 64
2. A nonſuit before appearance is not peremptory in appeal, &c. *ibid.*

Appendant, vide *Incident.*

Apportionment and Diviſion.

1. Where *A.* by contract ſubjects himſelf to one action only, it cannot be divided ſo far as to ſubject him to two 65
2. *Ergo* indorſee of part of a ſum in a bill of exchange cannot have action for that part *ſans* ſhewing the other part to be ſatisfied *ibid.*
3. So where the contract is at firſt entire, it cannot afterwards be divided in an action *ibid.*
4. As where the contract is to pay 100*l.* *per annum* for his ſervice, action lies not for three quarters *ibid.*
5. So of a leaſe for years at 20*l.* *per ann.* it lies not for any leſs term than a year *ibid.*
6. And ſo of other contracts for annuities, wages, debts, &c. the contract cannot be apportioned *ibid.*
7. But if in a leaſe the *habendum* be for years, yet the rent may be apportioned according to the *reddendum* *Page* 141

Apprentices.

1. An apprentice cannot be bound nor diſcharged without deed 68
2. He is not aſſignable over (except by the cuſtom of *London* to one of the ſame trade) 66, 68
3. Nor is the maſter's executor bound to provide for an apprentice in huſbandry, on 5 *El.* 66
4. Yet the executor is liable in covenant, if he does not inſtruct an apprentice or find him another maſter 66, 68
5. Whatever the apprentice gains belongs to a maſter, and he may have an action for it 68
6. A covenant between the maſter and a third perſon, the ſervant being no party, makes no apprenticeſhip 479
7. Service as apprentice beyond ſea, qualifies one to uſe a trade in *England* within 5 *El.* *vide bis* 67
8. And following a trade for ſeven years is ſufficient without any binding, &c. and 5 *El.* a hard law 613 *And note.*
9. Juſtices may compel a maſter to take an apprentice, &c. 67
10. Juſtices may diſcharge an apprentice, and alſo order a reſtitution of the money given with him *ibid.* and 490
11. So the Seſſions may diſcharge him by original order there, and order the money to be returned 68, 491
12. An apprentice may gain a ſettlement (though the maſter has none) as a hired ſervant, by 14 *Car.* 2. 533
13. An order by four juſtices for diſcharging an apprentice, &c. good, though the maſter does not appear 490
14. But their power to diſcharge apprentices extends only to ſuch trades as are named in the ſtatute 471, 490
15. And the order of diſcharge muſt be

be under the hands and ſeals of four juſtices of peace *Page* 470
16. But in *certiorari* to remove ſuch order the very diſcharge need not be returned, but only the ſubſtance thereof 470

See alſo *Indictments*, *Orders*, and *Seſſions*.

Arbitraments.

1. Where an award creates a new duty, the old is extinguiſhed 69
2. But if it only ordains a releaſe to diſcharge the old duty, it is otherwiſe *ibid.*
3. An award may be good though no time appointed for performance, *per Holt*, for the law ſupplies the time *ibid.*
4. For whether it be to be on requeſt or tender, or not, the law ſays it ſhall be in convenient time *ibid.*
5. An award that the party or his executors ſhall releaſe, *&c.* is good, for either may be uſed for nonperformance *ibid.*
6. An award that a ſuit in *Chancery* ſhall be diſmiſſed, is good 75
7. An award that all ſuits ſhall ceaſe, is good and final; but an award to be nonſuit is not 74, 75
8. An award may be good in part and void in part 74, 83
9. As an award to make general releaſes of all demands to the time of the award is good for ſo much as goes to the time of the ſubmiſſion, and void for the reſidue 74
10. An award to pay the coſts of ſuch a ſuit is uncertain, *contra* if to pay ſuch coſts as the maſter ſhall tax 75
Award to pay coſts means coſts to be taxed by the maſter. n. ibid.
11. An award that *A.* ſhall beg *B.*'s pardon in ſuch manner and place as *B.* ſhall appoint, is void 71
12. *Quære* if an award of money to be paid to a third perſon be good, unleſs it appear to be for the benefit of one of the parties 74
13. An award of a collateral thing in ſatisfaction, held a good plea without ſhewing performance 76
14. Money paid on a void award may be pleaded or taken as accord with ſatisfaction *Page* 71
15. An award pleaded as made *de & ſuper præmiſſis*, is not enough, unleſs it appear to be ſo *in ſe* 70
16. *Quære* if an award unperformed, though it gives a new duty, can be a good plea after time of performance elapſed 69
17. A parol award may be pleaded, ready to be delivered, *&c.* 75
18. If an award be pleaded without date, it muſt be computed from the delivery 76
19. A ſubmiſſion by *A.* attorney for *B.* concerning accounts *inter B.* and *C.* good to bind *A.* but not *B.* 70
An award, if final, is ſufficiently mutual, n. ibid.
20. A ſubmiſſion to an award made a rule of Court, though the conſent was only conditional 72
21. An award made under a rule of Court is *quaſi* part of the rule 71
22. And on breach of ſuch award, the party may proceed both by action and attachment at the ſame time 73, 83
The attachment will be diſcharged if the party is in execution on the action; and will not be granted if an action has been previouſly brought, or there is contrariety of evidence, n. ibid.
23. Service of a *ſubpœna* held a breach of a rule of reference made at *niſi prius*, and attachment granted, vide *Attachment* 73
24. What a good cauſe to ſet aſide an award made by rule of Court, and what not 71
And vide note ibid.
25. Appointment of an umpire by arbitrators before the time expires for making their award is void 70
The arbitrators may appoint the umpire before they do any other act. If the umpire refuſes, they may appoint another, n. ibid.
26. Yet ſee where an *umpirage* may be made before ſuch time is expired, or not 72
27. In what caſes ſuch appointment of an empire is revocable, or not 70
28. On

28. On a reference to three foremen of the jury the regularity of their proceedings examined into *Page* 73, 84

29. In debt on bond to perform an award, omiſſion in the republication of a void part of the award, is no variance; *aliter* if not void 72

Awards conſtrued leſs ſtrictly than formerly, n. ibid.

See alſo *Attachment*.

Arreſt of Judgment.

1. There are two ſorts of matter for which judgment may be arreſted, *viz.* intrinſic and extrinſic 77
2. Intrinſic, when ſome matter appears on the record itſelf which renders the judgment erroneous *ib.*
3. Extrinſic, when ſome foreign matter is ſuggeſted, which renders the writ not only abateable but abated *ibid.*
4. The difference between the old method of pleading and moving in arreſt, *&c.* 77, 78
5. And ſee No. 4. The method at this day of moving in arreſt, *&c.* 78
6. The party has commonly four days after the *poſtea* brought in to move in arreſt 77
7. But if the *diſtringas* be returnable within term, ſo that there are not four days between the trial and the end of the term, judgment may be entered, if not arreſted that term *ibid.*
8. After a *capiatur pro fine* iſſued, no arreſt of judgment 78

Motion in arreſt of judgment on the crown ſide may be made at any time before ſentence, n. ibid.

9. Judgment arreſted becauſe more damages recovered than there ought 663
10. See the entry of an arreſt of judgment on a prohibition, where a verdict was for the plaintiff 655
11. On motion in arreſt and rule to ſtay judgment *quouſque*, *&c.* and afterwards the Court being divided no judgment could be had 17
12. In *aſſumpſit*, after verdict, judgment arreſted becauſe *nudum pactum* *Page* 364
13. See a judgment arreſted becauſe more damages given than there ought 663

See alſo *Judgments*, *Trials*, and *Verdicts*.

Arreſt of the Body.

1. Arreſt on *Sunday* is void, and the party may have falſe impriſonment 78

In what caſes a perſon may or not be arreſted on a Sunday, n. ibid.

2. No arreſt can be without actually touching the body 79
3. But if the bailiff be prevented from touching, by the party's offering to ſtrike with a weapon, it is an aſſault *ibid.*

The arreſt is ſufficiently made if the party ſubmits without being touched. The bailiff need not be the hand that arreſts, but it muſt be done by his authority, n. ibid.

4. And if the bailiff once touch him in the arreſt, he may purſue and break open the houſe to take him *ibid.*
5. Or he may have an attachment, or return a reſcue againſt him *ibid.*
6. Where there are two ſheriffs the arreſt or neglect of one is the arreſt or neglect of both 152

See alſo *Eſcape*, and 274

Aſſault, vide *Treſpaſs* and *Arreſt* 3.

Aſſemblies unlawful, vide *Riots*, &c.

Aſſets.

1. If *A.* takes a bond for another in truſt, and dies, this is not aſſets in the hand of *A.*'s executors 79
2. So if the obligee aſſigns over a bond, and covenants not to revoke, and dies, this is not aſſets in the hands of the obligee's executor *ib.*
3. If the executor of leſſee for years enter, *&c.* no part of the profits but what is above the rent is aſſets *ibid.*

4. For

4. For the rent is received by the executor as tertenant, and as appropriated to the uſe of the leſſor *Page* 79
5. *Quære* the diſtinction between legal and equitable aſſets, and how either are liable 507
6. And how far lands are liable to pay debts as aſſets 80
7. Outlawry upon meſne proceſs does not make the debt a lien upon the land *ibid.*
8. And bringing debt upon a judgment is no waiver of the lien created by the judgment *ibid.*
9. Where a debtor pays the teſtator's debt to *A.* with conſent of executor, it is aſſets; *aliter* if without conſent 207
10. Unleſs the executor brings action, and recovers, and then it is aſſets even before execution *ibid.*
See alſo *Executors* and *Legacies*.

Aſſignment.

1. Where the leſſor himſelf cannot maintain covenant, &c. his aſſignee ſhall not 81
2. *Ergo* the aſſignee of a covenant cannot ſue in *England* for rent reſerved on lands in *Ireland*, though payable in *London* 80, 81
3. The aſſignee of a reverſion, though by fine, cannot have covenant for the rent, &c. without attornment, *Q.* 82
4. But ſee now the ſtatute 4, 5 *Annæ*, *c.* 16, for amendment of the law in this particular *ibid.*
5. Leſſee aſſigns to *A.* *A.* aſſigns to *B. ſans* notice to the leſſor, yet leſſor cannot have covenant againſt *A.* for arrears incurred after the aſſignment of *A.* *Q.* 82
A mortgagee who has not entered, is not liable to be ſued as aſſignee. The aſſignee is diſcharged by aſſigning to an inſolvent perſon unleſs per fraudem, *n.* ibid.
6. And *Kighly*'s Caſe in 1 *Sid.* 338. *Raym.* 162. 2 *Keb.* 260. denied *ibid.*
7. But admitted he may have covenant againſt *A.* for rent due before aſſignment 338
See alſo *Covenant*.

Aſſize.

1. The writ in aſſize may be returnable at any common day, or return day; alſo the aſſize may be adjourned *Page* 82
2. The aſſize is to be arraigned in *French*, but cannot be proceeded in before the recognitors appear *ibid.*
3. The defendant nonſuited becauſe not ready to count *inſtanter* on the tenant's demand *ibid.*
4. But ſuch nonſuit not peremptory; for the demandant may have a new aſſize *ibid.*
5. If the defendant in aſſize plead in abatement, he muſt plead over in bar at the ſame time 83
6. No imparlance allowed therein without a good cauſe, for it is *feſtinum remedium* *ibid.*
7. And where ſeveral are defendants it ſhall be taken by default againſt ſuch of them as do not appear the firſt day *ibid.*

Aſſumpſits, vide ante *in Actions on the Caſe*, &c., *and Breach*, &c. poſt.

Attachment.

1. In caſes of awards, though not legally good, attachment lies for nonperformance 83
The manner of obtaining an attachment, n. ibid.
2. *Aliter* if impoſſible, but the party is excuſed only as to that part which is impoſſible 74, 83
3. It lies not for not performing an award (though made on a rule of Court) without a perſonal demand 83
4. On award of three foremen (though verdict given for ſecurity) attachment for the breach 73, 84
5. For contemptuous words of the Court, attachment without a rule to ſhew cauſe 84
Qu. *When the contempt is only ſworn to by one witneſs* ibid.
6. When one is taken on attachment for ſuch contempt, &c., he enters into recognizance to anſwer interrogatories *ibid.*
He cannot confeſs the contempt without

without anſwering interrogatories, except in caſe of a reſcue or contempt in face of the Court, n. *Page* 84
7. On rule to put off trial on payment of coſts, no attachment for non-payment 83
8. Attachment for a reſcue is never granted upon affidavits only; but it muſt be returned on the writ 586
9. See an attachment againſt a judge of a corporation court, and what a contempt is 201

See alſo *Sheriff* and page 260

Attainder.

1. Attainder of high treaſon by commiſſion on 28 *H.* 8. *c.* 15. works corruption of blood 85
2. But not attainder of piracy, or treaſon, *&c.*, before the conſtable and marſhal, or admiral *ibid.*
3. One attainted for counterfeiting the coin on 8, 9 *W.* 3. forfeits lands, but corruption of blood is ſaved *ibid.*
4. So that the forfeiture and the corruption are diſtinct parts of the penalty, and one may be, and the other not *ibid.*
5. In attainders of felony the forfeiture to the lord is only by way of eſcheat *pro defectu tenentis* ibid.
6. And the not deſcending is but the conſequence or effect of ſuch incapacity *ibid.*
7. But in treaſon the lands come to the crown as an *immediate forfeiture*, and not as an eſcheat *ibid.*
8. An executor may bring error to reverſe the attainder of the teſtator 295

See alſo *Treaſon.*

Attorney and *Solicitor.*

1. The ſtat. 3 *Jac.* 1. *c.* 7. extends only to attornies of the courts at *Weſtminſter*, and not to attornies of inferior courts 86
An attorney muſt deliver his bill a month before the commencement of the action. The items of the bill cannot be examined on an enquiry or at niſi prius, *n.* ibid.
2. That ſtatute may be pleaded to debt and *indebit. aſſump.*, unleſs a ſpecial promiſe laid, but then not, nor to an *inſimul comp.* *Page* 86
3. An attorney is not compellable to appear for any one, unleſs he takes his fee or backs the warrant 87
4. Where an attorney appears for any, the Court will not queſtion his authority, but leaves the party to his action 86
5. Nor ſhall a judgment be ſet aſide for that he appeared without warrant, if he be ſufficient; *contra*, if inſufficient 88
6. And his conſent to accept an iſſue, *&c.* after judgment ſigned, binds the client, though contrary to his expreſs order 86
7. Where an attorney's bill on action brought by his executor ſhall be referred to the maſter or not, *vide* 89
8. Where writings come to his hands as an attorney, the Court will on motion make a rule to redeliver them 87
9. But where they come to his hands in any other manner, the party muſt reſort to his action *ibid.*
10. A warrant of attorney for the plaintiff in the principal action cannot extend to the ſuit againſt the bail, but there muſt be a new warrant 89
11. A judgment by confeſſion upon a warrant of attorney may be entered in the vacation as of the term precedent, though the defendant died in the vacation 87
12. But a *poſt terminum* roll cannot be filed without leave of the Court *ibid.*
13. A *memorandum* was amended by the warrant of attorney on the ſame roll 88
14. Till a warrant be filed or entered it is not a matter of record, but one may appoint an attorney in court upon record *ibid.*
15. See the ancient practice of entering warrants of attorney on a diſtinct roll, and when altered *ibid.*
16. A *remittit damna* may be by attorney, but a *retraxit* muſt be *in propria perſona* 89
17. An

17. An attorney defendant may have the venue changed from any other county to *Middleſex (vide Barriſter) Page* 668

18. See an attorney fined 515

See alſo *Abatement, Privilege, Rules of Court*, &c.

Attornment.

1. Leſſor makes a ſecond leaſe, and before the firſt expires levies a fine. Attornment by the firſt leſſee to the conuſee is ſufficient 90
2. In pleading a feoffment of a manor, it is not neceſſary to ſhew the attornment of the tenants 91
3. Attornment is pleadable without a venue, but triable only where the land lies *ibid.*
4. Upon iſſue *non conceſſit*, attornment need not be given in evidence 90
5. Aſſignee of a reverſion though granted by fine, could not have action for rent without attornment 82
6. But this now remedied by the ſtatute 4 & 5 *Ann. c.* 16. for amendment of the law *ibid.*

Audita Querela.

1. This in itſelf is no *ſuperſedeas*, and therefore execution may be taken forth, unleſs a *ſuperſedeas* be actually ſued 92
2. And if the *audita querela* be founded on a deed, that muſt be proved in court before a *ſuperſedeas* ſhall be granted *ibid.*
3. If an *audita querela* be founded on a record, or the party be in cuſtody, the proceſs upon it is a *ſci. fa. ibid.*
4. But if grounded on a matter of fact, or the party not in cuſtody, the proceſs is a *venire* and diſtreſs infinite *ibid.*
5. Where the party is in execution, he may either have a *ſci. fa.* or *venire ibid.*
6. Where two *nichils* are returned, the Court will relieve on motion without an *audita querela* 93
7. *A.* on judgment againſt him renders himſelf, but never gives notice to the plaintiff, nor gets the bail diſcharged, and the plaintiff on *ſci. fa.* gets judgment againſt the bail, the Court would not relieve them on motion, but put them to their *audita querela Page* 101
8. One taken in execution on an *audita querela* may be bailed 105

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Averments.

1. Where promiſes are mutual, performance or tender, &c. muſt be averred 112, 172
2. So where one thing is to be done as the conſideration of the other in contracts, &c. 113, 171
3. Where and in what caſes conſiderations in *aſſumpſits* muſt be averred, *vide* 23, 24, 25, 29
4. Where the replication muſt conclude to the country, and where with an averment 2
5. Where joint-tenancy is pleaded in abatement, the life of the other joint-tenant not named muſt be averred 32
6. On adminiſtration granted to *A.* during the abſence of *B.*, the narr. muſt aver that *B.* is abſent 42
7. Where an award is pleaded to be made before the day, *ready to be delivered* need not be averred 69
8. A parol award may be pleaded with averment of *ready to be delivered*, &c. 75
9. Where uſes may be averred by parol or not, *vide* 676
10. No averment can be admitted of a truſt to ſuperſtitious uſes by the ſtatute of frauds 162
11. Any matter out of a deed that alters the caſe cannot be averred 197
12. Nor is any averment to be received againſt the expreſs words of a deed or will 227
13. Where a matter is averred to be within the juriſdiction, the defendant muſt plead to the juriſdiction, or elſe is eſtopped 202
14. See of averments in indictments on 5 *Eliz*, that it was a trade at the time of the act 611

15. Where uſes may be averred, *vide Page* 676, 678

See alſo *Declarations*, *Eſtoppel*, and *Pleadings*.

Avowry, vide *Replevin*.

Authority.

1. It is eſſential to a deputy to have the ſame power with his principal 95
2. And a covenant or condition to reſtrain ſuch power is void 96
3. And he may do all acts that his principal could, except making a deputy *ibid.*
4. But though he cannot make a deputy as to his whole power, yet he may impower him to do particular acts *ibid.*
5. As a deputy-ſteward of a court-baron may impower another to hold a court, take ſurrenders, &c. 96, 97
6. And ſuch under-deputy may either act in his own name, or elſe, reciting his authority, act in the name of the deputy or principal 97
7. Except an under-ſheriff, who muſt act in the high ſheriff's name, becauſe the writs are ſo directed, &c. *ibid.*
8. The acts of a ſteward *de facto* are ſufficient among tenants of a manor *ibid.*
9. Authority given by letter of attorney may be either general or ſpecial *ibid.*
10. And though particular authorities cannot be varied from in matter of ſubſtance *ibid.* and 658
11. Yet if only a variance in circumſtance it may be good 97
12. Principal officer anſwerable both to himſelf and deputy 18, 19
13. Yet the deputy is alſo chargeable as a wrong-doer *ibid.*
14. Where an authority is given to juſtices of peace it muſt be exactly purſued 475
15. See other kinds of authorities 363, 419, 442, 454, 467, &c.

See alſo *Power*.

Award, vide *Arbitrement*.

B.

Bail in Civil Caſes.

1. SEE the rules of practice about putting in bail and excepting thereto *Page* 89
2. In debt on bond, though the defendant ſays it was uſurious, or *per dureſs*, it ſhall not excuſe from ſpecial bail 100
3. Special bail in *indebit. aſſump.*, ſo for money won at play, *per Holt contra* 2 *ibid.*
4. But not in debt on bond to perform covenants, yet with reſpect to the breaches and the damage thereby (the meaſure of which ſhall be taken from the plaintiff's oath) it may *ibid.*
5. In *B. R.*, if the ſum recovered exceed the ſum in the *ac etiam bille*, the bail is not liable 102

To what extent bail are liable, n. ibid.

6. On removal by *habeas corpus* ſpecial bail muſt be given in here, except in caſes of executors 98, 101, 102
7. But on ſuch removal the Court will examine the cauſe of action, and take bail accordingly *ibid.*
8. And on removal out of an inferior court, the plaintiff is bound to accept the bail below, except in *London* 97
9. For the ſufficiency of bail in *London* is at the peril of the clerk who is reſponſible, and the plaintiff cannot except there *ibid.*
10. Yet in debt againſt executor on a judgment ſuggeſting a *devaſtavit*, he ſhall give bail; for there the action is in the *debet & detinet* 98
11. And on removal by *habeas corpus* where ſpecial bail was below, he ſhall give bail to appear within two terms, but not to pay the condemnation *ibid.*
12. On error in parliament of a judgment affirmed in *B. R.* new bail is required 97
13. For the firſt bail does not extend to coſts aſſeſſed in the Houſe of Lords,

Lords, therefore a new recognizance is to be *Page* 97
14. One charged in cuſtody of the ſheriffs of *L.* was diſcharged on common bail for want of proceeding in two terms, by 4, 5 *W.* 3. 98, 99
15. In an action on a replevin-bond common bail ſhall be admitted 99
16. The merits of the caſe not to be examined into upon bailing (*vide ſupra* 7.) 99, 100
There is a difference between the King's Bench and Common Pleas in this reſpect, n. *ib. Qu. tamen, & vide* Cooke *v.* Bobree, *H. Bl.* 10.
17. If the ſheriff takes inſufficient bail for appearance, and the plaintiff refuſe it, he is liable to an action, and may be alſo amerced 99
18. The ſheriff may take bail-bond on attachment for contempt, but the proſecutor may refuſe to accept it 608
19. But if in either caſe the plaintiff take an aſſignment of the bail-bond (though inſufficient) the Court will not amerce 99
20. *A.* recovers in three actions where were three bails, the defendant rendered himſelf, and one of the bails entered an *exoneratur* on the bail-piece; this does not diſcharge the reſt till *exoneratur* entered for them alſo 98
How to obtain an exoneratur, n. ibid.
21. So *A.* on judgment againſt him renders himſelf, but gives the plaintiff no notice, nor diſcharges the bail-piece; and the plaintiff on *ſci. fa.* gets judgment againſt the bail, and the Court would not relieve becauſe no *exoneratur* entered 101
22. Though a render before return of the *latitat* is not pleadable to an action on a recognizance of bail *ibid.*
Within what time principal may be rendered to diſcharge the bail. Suing on recognizance in a different court will not reſtrain the time, n. ibid.
23. Yet the Court *ex officio* allowed it on the *latitat*, as well as on a *ſci. fa.*, and denied the caſe of *Miles* and *Bateman*, 3 *Keb.* *Page* 101
24. And note, render in diſcharge of bail in an action will not diſcharge the bail on an indictment 105

Bail in Criminal Caſes.

1. One committed for treaſon or felony is to enter his prayer on the *habeas corpus* act, to be tried the firſt week of the term or day of ſeſſions after his commitment 103
2. But if an act ſuſpends the power of bailing for a time, there he need not enter his prayer till the firſt week in term or day of ſeſſions after the expiration of ſuch act 103
3. Yet Lord *Ayleſbury* was bailed though no prayer entered in time, becauſe long impriſoned, trial delayed, and life in danger 104
4. One committed for aiding an eſcape of *D.* committed for treaſon, was bailed for default of proſecution 103
5. One indicted of murder ought not to be bailed upon affidavits of the evidence 104
6. But one found guilty of murder by the coroner's inqueſt only is bailable, *contra* if indicted *ibid.*
7. One indicted of murder, and found guilty of manſlaughter, not bailable before clergy had 103
8. Yet *Liſle*, who was indicted of murder and found guilty of manſlaughter, was bailed before clergy had *ibid.*
9. So in appeal of murder and found guilty of manſlaughter, one was bailed before clergy, *Q.* 61, 62
10. *M.* committed for forging indorſements on bank-bills, bailed, on a *habeas corpus*, becauſe only a great miſdemeanor 104
11. But upon error of a conviction for a forcible detainer, the defendant was refuſed to be bailed 106
12. Becauſe in execution for the fine, *i. e.* 100 *l.*, though the long vacation coming on *ibid.*
13. Yet one taken on *excom. cap.* is bailable, while the *ret.* of the *ha-*

habeas corpus is under conſideration *Page* 105
14. See there the manner of entry of ſuch bail, and condition of the recognizance *ibid.*
15. But bailing during conſideration, (as 13.) is diſcretionary, and the court will refuſe it if he pleads a falſe plea 106

Bailiff.

1. A corporation aggregate may appoint a bailiff to diſtrain without deed 191
2. In replevin, if the defendant makes conuſance, or juſtifies a bailiff to *J. S.* a traverſe of the command of *J. S.* is ſufficient 107
3. So in treſpaſs for taking cattle or goods, for in thoſe caſes, though *J. S.* may have a right to take the cattle, &c. yet a ſtranger cannot juſtify the taking but by his command, &c. *ibid.*
4. But *aliter* in treſpaſs *quare clauſum fregit*; for there, though the defendant juſtifies as bailiff, or by command of *J. S.* the plaintiff ſhall not traverſe the command, becauſe it would admit the truth of all the reſt of the plea *ibid.*
5. In treſpaſs on a juſtification as bailiff to a court leet for levying an amercement, ſome eſtreat of the court or warrant of the ſteward muſt be ſhewn *ibid.*
6. *Note*, in replevin the bailiff is an actor, and ſhall recover upon the merits 108
7. But in treſpaſs the bailiff is only to excuſe the wrong, and recovers nothing *ibid.*

Bakers, vide *Weights and Meaſures.*

Bankrupts.

1. An innkeeper held not within any of the ſtatutes about bankrupts, though alſo a part-owner of a ſhip 109

An innkeeper ſelling liquors out of the houſe to any perſon who applies, is within the bankrupt laws, n. ib.

2. So a buying and ſelling under a particular reſtraint is not within the ſtatute *Page* 110
3. But an *Engliſh* ſubject trading from foreign parts may be a bankrupt *ibid.*

Any perſon trading to England, *and being there occaſionally, may be made a bankrupt on an act committed in* England, n. ibid.

4. If a defendant renders himſelf in diſcharge of bail, and lies two months, he is a bankrupt from the arreſt 115
5. Yet adjudged though lying in priſon upon arreſt makes a bankrupt, it is otherwiſe if he puts in bail 110
6. Outlawry, after an act of bankruptcy committed, ſhall not defeat the intereſt the creditors have acquired in his eſtate 108
7. Yet a purchaſer after ſhall not be impeached by a commiſſion ſued five years after the bankruptcy 109
8. A plain act of bankruptcy cannot be purged by dealing afterwards; *aliter* if doubtful only, (and note accordingly,) 110
9. An aſſignee has property by relation from the time of the bankruptcy, ſo as to avoid all meſne acts 115

Note of caſes concerning the relation to the act of bankruptcy ibid.

10. See the judges reſolutions on the ſtat. 4 & 5 *Ann.* againſt frauds committed by bankrupts 111, 112
11. A mortgagor or purchaſer precedent, though by a defective conveyance, to be preferred before the aſſignees of bankruptcy 440

Bargain and Sale of Goods.

1. Earneſt only binds the bargain, and gives the buyer a right to demand the goods 113
2. But notwithſtanding earneſt, the money is to be paid on fetching away the goods; and a demand *ſans* payment is void *ibid.*
3. And if the buyer does not come to pay, the ſeller ought to go and requeſt him, and if then he does not pay, &c. in convenient time, the agreement is diſſolved *ibid.*

4. Where

4. Where one thing is to be the conſideration of the other, though there be mutual promiſes, performance muſt be averred *Page* 112
5. As if I ſell you my horſe upon your paying me 10*l.* I cannot have the money without a delivery or tender of the horſe, nor you my horſe without averring payment or tender and refuſal of the money 113
6. So where mutual promiſes are to transfer ſtock on payment of ſo much money 112
7. But *aliter* where a time is limited for the performance on one part 113, 171, 172
8. If *A.* and *B.* come to a ſhop, and *A.* ſays to the ſeller, let *B.* have ſuch and ſuch goods, and I will ſee you paid, &c. the law intends *A.* to be the buyer, and *B.* to act but as *A.*'s ſervant 23, 28

Baron de *Peers.*

Baron and *Feme.*

1. Action againſt a feme covert allowed good, her huſband being alien enemy and in *France:* for a divorce ſhall be intended 116
In what caſes a feme covert may be ſued quaſi *ſole by reaſon of a ſeparate maintenance*, &c. n. ibid.
Feme covert after ſeparation, and the huſband gone abroad, liable to be made a bankrupt, n. ibid.
2. The huſband held liable to the wife's contract as a ſeparate trader, &c. becauſe they cohabited, *per Holt* 113
3. Wife cannot charge her huſband after notorious ſeparation, though by conſent and ſeparate allowance, 116
4. Nor is he bound by her contracts, or liable even for neceſſaries, after a notorious elopement, unleſs he take her again 116, 119
5. But if he turns her away he gives her credit for neceſſaries wherever ſhe goes, *per Holt* 118
Note reſpecting the liability of a huſband to anſwer for neceſſaries for his wife ibid.
6. And while they cohabit he ſhall anſwer her contracts, &c. for by cohabiting his aſſent is preſumed, *per eundem* *Page* 118
7. *Contra* where the huſband expreſsly diſſents beforehand, by notice to the owner or his ſervant, *per eundem* *ibid.*
8. If ſhe takes up materials, as ſilks, &c. and pawns them before made into clothes, he is not liable; for they never came to his uſe. *Contra* if made up and worn, *per Holt* *ibid.*
9. Action lies not on a promiſe of marriage, except the contract is mutual, for otherwiſe it was only *nudum pactum* 24
Note reſpecting promiſes of marriage ibid.
10. A contract of marriage *per verba de præſenti* is a marriage *de facto* 437, 438
11. And whether *per verba de præſenti* or *de futuro* is cognizible in the ſpiritual court, and their ſentence is binding 437
12. Yet held that marriage by a mere layman was void, and a cohabitation thereupon did not entitle the man to adminiſtration of the woman's goods 119
13. For on his demanding a right due to huſbands by the eccleſiaſtical law, he muſt prove himſelf a huſband by the ſame law 120
14. *Quære* in caſe of ſuch huſband's death, if it ſhall entitle the feme and iſſue to a diſtribution *ibid.*
15. Note, the form of pleading a marriage is, That it was *per preſbyterum ſacris ordinibus conſtitut.* *ibid.*
16. Yet in debt by baron and feme *nunques accouple*, &c. is no plea, for a marriage *de facto* is ſufficient 437
17. Nor can the ſpiritual court annul a marriage after the parties are dead, becauſe they proceed *pro ſalute animæ* 121
18. Yet evidence at common law was admitted to baſtardize a peer, even after the death of himſelf and parents *(durum)* 120, 121
19. The huſband may releaſe coſts adjudged to the wife in the ſpiritual

court, unleſs a ſeparation be, and alimony allowed *Page* 115
20. He alone muſt bring the action for work done by her during coverture, unleſs an expreſs promiſe be made to her 114
Where the wife may, muſt, or may not join in actions on contracts, n. ibid.
21. And the advantage of ſuch work ſhall not ſurvive to her, but go to the huſband's executors *ibid.*
22. But money earned by her living ſeparate ſhall go towards her own maintenance 113
23. Trover by baron and feme, *ad damnum* of both, held naught after verdict; for the poſſeſſion and property of the wife is veſted in the huſband 114
Where the wife may join in trover or replevin, n. ibid.
Treſpaſs againſt baron and feme for taking goods and converting ad uſum ipſorum, *good* id. ib.
24. But treſpaſs by him for impriſonment of the wife, *per quod negotia viri infecta remanſ. ad damp.* of both, held well after verdict 119
In what actions relative to the perſon of the wife ſhe may, muſt, or may not be joined, n. ibid.
25. For matter may be alleged in aggravation of damages, for which no action will lie *ibid.*
26. Huſband of a feme executrix gives a new day to the teſtator's debtor, who then makes a new promiſe, &c. he may bring *aſſumpſit* thereon without joining the wife 117
27. But if he dies before recovery ſhe is reſtored to her former right, for the duty was not extinguiſhed by the new promiſe *ibid.*
28. A *ſci. fa.* by baron and feme on a judgment recovered by her while ſole, if after execution awarded, ſhe dies, it ſurvives to the huſband 116
29. In an action againſt baron and feme he ſhall give bail for appearance both for him and his wife 115
Where the wife being arreſted, or taken in execution, is diſcharged or not, n. *Page* 115
A feme covert obtaining credit quaſi *ſole act relieved on motion* id. ibid.
30. But where one action againſt the huſband only, he cannot declare againſt him and his wife *ibid.*
31. In an action againſt both for a battery by the wife while he was in priſon, a declaration cannot be delivered at the priſon againſt him & *ux.*, but proceſs muſt be ſued againſt the wife, and ſhe arreſted 114
32. The wife may juſtify an aſſault in defence of her huſband 407, 437
33. Huſband and wife covenant to levy a fine of the wife's land to the uſe of the heirs of the body of the huſband on the wife begotten, is void 675
34. *A.* marries *B.* living a former wife, and receives her rents, &c. *B.* may have *indeb. aſſump.* as for money received to her uſe, the huſband having no right to receive it, &c. 28
35. A covenant before marriage to releaſe the wife's guardian after, ſet aſide in equity 158
36. If *baron* and *feme* declare on *indeb. aſſump.* to them as executors on a nonſuit, they ſhall pay coſts 207
37. A warrant, &c. by a *feme ſole*, is revoked by her marriage after 399

Barretry, vide *Uſury*.

Barriſters at Law.

1. If a defendant be a barriſter or attorney, &c. attending the court, he may have the venue changed to *Middleſex* from any other county 668
2. Alſo a trial at bar is ſeldom denied to any gentleman at the bar or officer of the court 651

Baſtard.

1. The rule that none ſhall be baſtardized after his death holds only in caſe of *baſtard eigne* and *mulier puiſne* (vide *Baron* and *Feme*) 17, 18, 120, 121

2. But

2. But the ſpiritual court cannot annul a marriage, or baſtardize iſſue after the party's death *Page* 548
3. A child begotten after divorce *a menſa & thoro* only ſhall be taken to be a baſtard 123
4. *Aliter* after a voluntary ſeparation, unleſs found that the huſband had no acceſs *ibid.*
5. So if the huſband be beyond ſea during the whole time of her going with child, it is a baſtard 122, 534
6. *Contra* if he were here at all during that time, for then acceſs would be preſumed 122
Any proof of non-acceſs is ſufficient, n. ibid.
7. A baſtard child is generally to be ſettled where it is born 485
8. But if born in *B.* pending an illegal order for removing the mother thither, it is no ſettlement there 121, 474, 532
9. Nor does the juſtice's order for maintenance determine the baſtard's ſettlement 123
10. Money may be ordered to be paid to the overſeers for maintenance of a baſtard child 122
11. Juſtices may order payment of a ſum in groſs for that purpoſe 124
12. Order to pay ſo much *per* week till it be fourteen years old, is ill 121, 478
They muſt reſide with their mothers till ſeven years old, but the pariſh where they are ſettled is liable to an order for their maintenance, n. ib.
13. Order for maintenance quaſhed becauſe the words of adjudication were in the ſingular number for the plural 122
14. An order of baſtardy under the hands of more than two juſtices is good, if one of them be of the *quorum* 477
15. From an order of baſtardy the appeal muſt be to the next quarter-ſeſſions 482
The deciſion was to the next general ſeſſions, and its being to a quarter-ſeſſions was held inſufficient, unleſs it appeared that no general ſeſſions intervened; but the contrary has been ſince ruled, n. ibid.
16. *Viz.* To the next (quarter) ſeſſions after notice to the reputed father of the firſt order, baſtards are ſettled where born *P.* 480, 485
Baſtards are ſettled where born 482
17. On motion to quaſh an order of baſtardy, the reputed father muſt be preſent in court 475
18. By 28 *El. c.* 3. ſeſſions muſt proceed on the reputed father's recognizance 122
19. But by 3 *Car.* 1. *c.* they may commit him, *&c.* *ibid.*
20. Stat 13, 14 *Car.* 2. *c.* 12. *ſect.* 21. relates to the maintenance of poor children not baſtards 123
Bill of Exceptions, vide *Trial.*

Bills of Exchange.

1. At common law the drawer was not chargeable unleſs he had notice of the drawee's non-payment in convenient time 127
What notice muſt be given, and how it muſt be alleged, n. 128
2. And convenient time is to be guided according to the uſage of traders and particular circumſtances of caſes 133
What is reaſonable time for preſenting, n. ibid.
3. Yet where *A.* indorſes and delivers a bill to *B.* who keeps it by him long after payable, if not paid he may have *aſſumpſit* againſt *A.* (*vide infra*, 19.) 124
4. And the indorſement, delivery and detainer is no evidence that *B.* accepted it as ſo much money, unleſs paid *ibid.*
5. Nor ſhall a bill ſo received, *&c.* go in diſcharge of a precedent debt, except made part of the contract *ibid.*
Contra per ſtat. 4 & 5 *Ann.* vide *note*
6. As where *A.* ſells goods to *B.* and agrees to take a bill on *C.* in ſatisfaction, there *A.* is diſcharged though it be never paid *ib. vide* 442
7. A general *indeb. aſſump.* will not lie on a bill of exchange for want of a conſideration (as value received, *&c.*) 125
It lies where there is a privity between the parties, and a conſideration, n. ibid.

8. But a ſpecial *indeb. aſſump.* muſt be againſt the drawer, or a ſpecial action of the caſe on the cuſtom of merchants *Page* 125
9. And drawing of a bill makes a merchant to ſupport the cuſtom in that caſe 125,.445
10. A bill payable to *A. or bearer* is not aſſignable to charge the drawer, *contra* if to *A. or order* 125
A bill to bearer is aſſignable, n. ib.
11. But ſuch indorſement charges the indorſor, for the indorſement is in nature of a new bill *ibid.*
12. Trover for a bill payable to *A.* or bearer, will lie againſt the finder, *&c.* but not againſt the aſſignee 130
The innocent holder of a bill or note which has been ſtolen or loſt may recover thereon, n. ibid.
13. The words, *or to his order*, in a bill, gives authority to aſſign it by indorſement, *&c.* 133
14. And the aſſigning of a bill, note, *&c.* not payable *to order*, charges the indorſor, but not the drawer, *vide pl.* 11. *ibid.*
15. A blank indorſement on a bill does not transfer the property without ſome further act 126, 130
16. But ſuch indorſement may be filled up by the indorſee ſo as to charge the indorſor 128
What liability ariſes from indorſing a blank check, n. ibid.
17. And ſo, though the bill be purchaſed at diſcount, *&c.* and ſo may an acquittance, *&c.* *ibid.*
18. Indorſee of part of a ſum in a bill, cannot bring an action *ſans* ſhewing the other part ſatisfied 65
19. *A.* indorſes two notes in ſatisfaction of a debt, but before receipt the drawer broke. *Quære* if the indorſor could be charged (*vide ſupra*, 3.) 132
20. An indorſor by cuſtom is only liable in default of the firſt drawer 130, 132
The law is otherwiſe, n. ibid.
21. Yet ſaid, the indorſor charges himſelf in the ſame manner as if he were the drawer 133
22. See what is neceſſary to be proved to charge the indorſor, in an action by the indorſee *Page* 128 *and notes*
23. Action lay not on a promiſſory note before the ſtatute, and it cannot be laid within the cuſtom of merchants, *vide bis* 129
24. On a promiſe (after day of payment) to pay *ſecundum tenor. billæ*, action lies 127, 129
25. So acceptance after day of payment is good, and amounts to a promiſe to pay generally 129
26. Acceptance by one, where the bill is drawn on two, binds both, if it concerns their joint trade 126
27. A declaration againſt the drawer is good *ſans* laying an expreſs promiſe, for by the drawing it is implied 128
28. In declaration on a firſt bill, want of averring the ſecond and third not paid is aided after verdict 129
It is not material on demurrer, n. ibid.
29. In declaration on a foreign bill, drawn at two uſances, the time of which it conſiſts muſt be averred 131
30. In declaration on inland bills againſt the drawer, a proteſt need not be ſet forth, nor neceſſary at common law *ibid.*
On foreign bills it muſt be alleged and proved; but the want of alleging it is only fatal on ſpecial demurrer, n. ibid.
31. See the form of a bill of exchange between two perſons only 130
32. An *aſſumpſit* on a promiſſory note on the cuſtom of merchants, held ill 24, 129
33. And goldſmiths notes are only a conditional payment without an expreſs conſent 442

Bonds, vide *Obligations*.

Biſhops, Archbiſhops, &c.

1. The Archbiſhop has a metropolitical juriſdiction over Biſhops by the common law 135
2. Which was uſurped by the Pope, but reſtored by the ſtatutes of *Henry* the 8th *ibid.*

3. A Biſhop may be puniſhed in the Archbiſhop's court for any offence againſt the duty of his office *P.* 134
4. A Biſhop cited before the Archbiſhop in perſon for ſimony, &c. *ibid.*
5. Archbiſhop or Biſhop may judge in perſon or by their vicar general *ibid.*
6. Their courts may puniſh a temporal offence, if committed in an eccleſiaſtical matter, or face of the court *ibid.*
7. All Biſhops are co-ordinate or *pares jure divino*, but not *jure humano* 135
8. He that can viſit can alſo deprive, (*Q.*) *ibid.*
9. On iſſue whether a parſon be deprived, the court writes to the Biſhop 135
10. But on iſſue whether a Biſhop be deprived, it writes to the Archbiſhop *ibid.*
11. Anciently biſhopricks were donative by the King, and conferred by inveſtiture 136
12. Tranſlation of Biſhops anciently was by poſtulation to the Pope 137
13. See the manner of creating and tranſlating a Biſhop at this day 136
14. Four things requiſite to complete a Biſhop, election, confirmation, conſecration, and inſtallation 137
15. Note, his former preferments are void by his conſecration and confirmation, not by his election 136
16. A Biſhop's leaſe, if it exceed the ſtatute, is void *in toto* as to the ſucceſſor 189
17. See the Biſhop's power to compel a ſequeſtration 320, 321

See alſo *Adminiſtrator* and *Preſentations*.

Breach in *Covenant, Debt, Caſe*, &c.

1. *A.* and *B. dimiſerunt* imports a joint covenant as to the intereſt granted 137
2. But it may be ſeveral with reſpect to ſubſequent acts 138
Breach may be aſſigned in the words of the covenant, or words tantamount, n. *Page* 138
3. In covenant where a plaintiff aſſigns ſeveral breaches, the defendant may traverſe them ſeverally *ibid.*
4. In covenant, breach that 3 *l.* for a year at *Lady-day* laſt was arrear, &c. held well on general demurrer 139
5. Covenant not to buy or ſell within two years, breach that *diverſies diebus & vicibus* between ſuch a day and ſuch a day he ſold to *H.* and ſeveral others, held well after verdict *ibid.*
6. The heir aſſigns a breach that the premiſes were out of repair *tali die & per* 10 *annos ante*, which included his anceſtor's time, yet held well 141
7. Agreement to convey to *H.* or his aſſigns, breach that he did not convey to *H.* (only) is good 139
Agreement that A. *or his aſſigns ſhould*, &c. *Breach that* A. *did not ſufficient*, n. ibid.
8. See the diverſity between covenant to do an act, *to* one or aſſigns, and *by* one or aſſigns *ibid.*
9. In debt and bond (except to perform an award) where a defendant pleads matter of excuſe that admits a non-performance, the plaintiff need not aſſign a breach in his replication 138
10. And ſee and note the difference of bonds to perform awards from all others, and the reaſon thereof *ibid.*
11. Alſo in debt on bond to perform covenants, the replication muſt ſhew a certain breach; but in action of covenant it is enough to aſſign a general breach 140
12. *Aſſumpſit* to deliver corn on or before the 5th of *January* into a barge, to be brought by the plaintiff; breach, That he did not deliver upon the 5th of *January*, is good *ibid.*
13. In a leaſe, if ſpecial days of payment are limited by the *reddendum*, the rent muſt be computed by that, and not the *habendum* 141

See alſo *Condition, Covenant*, 4, 5. *Bridges*,

Bridges, vide *Highways.*
Buildings, vide *Houſes.*

By-Laws.

1. A franchiſe granted, or corporation erected, may be regulated by by-laws, though no ſuch power expreſſed in their charter *Page* 142
2. Members are compellable to undergo offices, *&c.* impoſed by a by-law, even in caſes where they be indicted *ibid.*
3. He that is repreſented muſt take notice of the acts of the body repreſentative *ibid.*
4. A by-law, that all ſtrangers ſhall employ city-porters, is ill 143
5. But a by-law, that none but freemen ſhall be city-porters, ſeems good. *Q.* *ibid.*
6. For the freemen are repreſented by the livery-men, and bound by their acts and by-laws 142
7. *Note*, Wager of law does not lie in debt for breach of a by-law 682, 683, 684

See alſo *Corporations* and *London.*

C.

Canon Law. Vide *Laws.*

Capias Utlagatum. Vide *Outlawry.*

Carrier.

1. HE is liable in reſpect of his reward, and not of the hundred's being anſwerable over to him 143
2. For the hundred is made liable by ſtatute, but he was ſo at common law *ibid.*
3. And the being robbed does not excuſe him, becauſe it may be by ſuch combination and conſent as cannot be proved *ibid.*
He is anſwerable for loſs by fire, n. ibid.
4. *A.* undertaking to carry goods of all perſons indifferently for hire, is a common carrier, *&c.* 249, 250
5. In what caſes trover will lie againſt him or not, *vide* 655
6. And where the maſter of a ſtage coach is liable for goods loſt by the driver, *vide* *Page* 282

Certiorari, Recordari.

1. Where the *certiorari* is to remove orders, the *fiat* only is ſigned by the judge 150
2. But where it is to remove indictments, both the *writ* and the *fiat* muſt be ſigned by him *ibid.*
3. A *certiorari* generally lies to all inferior juriſdictions, as the court of *Ely*, and all franchiſes, *&c.* 148, 149
Note from the 6th edit. of Hawk. *ibid.*
4. So it lies to the juſtices of peace in *Wales*, and counties palatine, and commiſſioners of ſewers, *&c.* 145, 146
5. But not granted to the *Old Bailey*, nor to any juſtices of gaol-delivery, unleſs for ſpecial cauſe 144, 150, 151
6. A *certiorari* is like a *recordari*, which removes all things pending at any time between the *teſte* and *return* 149
7. And it is a *ſuperſedeas* to the proceedings *infra*, for the ſame reaſon that a *habeas corpus* is 148
8. But for removing indictments, *&c.* it is not to be allowed without bail; *vide* the late act 149
9. Nor is it to be ſerved after the jury are ſworn 144
10. Nor is it a *ſuperſedeas* to an execution begun before the *certiorari* iſſued 147
11. It ought to be to remove both the indictment and conviction, where the defendant is convicted 150
12. But it is not proper after conviction, unleſs where error lies not, or a fine is to be ſet in *B. R.* 149
13. It lies on a judgment given by the cenſors of the college of phyſicians for male practice, becauſe error does not lie 144
14. But a *certiorari* to remove a conviction of recuſancy was denied 145
15. Exceptions are uſually taken to orders of ſewers removed by *certiorari* before they are filed *ibid.*
16. *Note*,

16. *Note*; The whole body of commiſſioners of ſewers were laid by the heels for refuſing to obey a *certiorari* 144 *Page* 125
17. Where it iſſued to remove a conviction of deer-ſtealing, the return was quaſhed, being imperfect 146
18. On removal of a conviction for not paying the duty on cyder, the return in *Engliſh* was allowed 149
19. After *certiorari* to remove inquiſition of forcible detainer, the juſtices cannot award reſtitution 151
20. A *certiorari* to remove an indictment againſt *A.* will not remove one againſt *A.* and *B.* 146
21. So if to remove all orders againſt *A.* and *B.* omitting *(or either of them)* it will not remove an order againſt *A.* only 151
22. So if to remove an order touching *foreign ſalt*, where the order is touching ſalt, omitting *foreign*, it is not removed 145
23. Alſo the name of the pariſh in the writ and that in the order removed muſt appear to be the ſame 252
24. For there ought to be no variance between the writ and the order removed 145, 146, 151
25. Alſo the order itſelf muſt be returned *in hæc verba*, and not with *cujus quidem tenor ſequitur*, &c. 147, 493
26. And the return muſt be made by the juſtices (to whom the writ is directed) and not by the clerk of the peace 470
27. *Note*; Orders of juſtices are not to be removed before the time of appeal expired 147

See alſo *Error*, *Habeas Corpus*, and *Seſſions*.

Challenge.

1. On a challenge to a juror for favour, two of the jury were ſworn as triers. See their oath 152
2. Where two perſons are ſheriffs, and one is challenged, the *venire* ſhall be directed to the other *ibid.*
3. So where two coroners are, if one be challenged the other muſt act *Page* 152
4. A juror may be challenged in criminal caſes, if one of thoſe that found the bill of indictment 153, 634
5. So if the priſoner can prove by others that he ſaid he was guilty or would be hanged, &c. 153
6. So a juror may on a *voire dire* be aſked whether he hath any intereſt in the cauſe, &c. *ibid.*
7. And in a civil cauſe, whether he has given his opinion beforehand upon the right, &c. *ibid.*
8. But he cannot be examined to any matter criminal or infamous to himſelf in order to a challenge *ibid.*
9. It is a good challenge to a juror, that he hath been a juror before in the ſame cauſe 648

Chancery.

1. In equity, land agreed to be ſold ſhall go as money; and money agreed to be laid out in land, as land 154
2. Land ſettled in truſt to pay debts is diſcharged as ſoon as the money is raiſed, though miſapplied by the truſtees 153
3. Where lands are deviſed to pay debts, even debts barred by ſtatute of limitations ſhall be paid therewith 154
4. For they remain debts in equity, and the ſtatute has not extinguiſhed the duty though it takes away the remedy at law 154
Subſequent caſes in which this ſubject has been diſcuſſed. A deviſe to pay debts held to include one contracted during infancy, the ſtatute of limitations having attached in a petitioning creditor's debt, no bar to an action by aſſignees of a bankrupt, n. ibid.
5. A truſtee buying in debts for leſs than is due, ſhall not be allowed for the whole; *aliter* of one purchaſing in his own right *ibid.*
6. A term created for a ſpecial purpoſe, after that is determined, is attendant

attendant on the inheritance *P.* 154
7. Remainder of a term limited to daughters after a limitation in tail, if the eſtate-tail was contingent and never took effect, the daughters ſhall take, otherwiſe not (*vide* note) 156, 157
8. A term limited in remainder after the father's death in truſt for raiſing daughters portions at age or marriage: When either happens, the portions are to be raiſed in the father's lifetime 159
9. So where limited to take effect in caſe the father dies without iſſue-male by his then wife, and ſhe dies without ſuch iſſue in his lifetime, the portions are to be then raiſed *ibid.*
The inclination of the Courts is againſt raiſing portions in the father's lifetime—Caſes to that purpoſe, n. ibid.
10. But in no caſe ſhall the portions be raiſed before the contingency on which it is founded 160
11. A bond given to refund part of the portion without the father's (huſband's) privity is void 156
Treaties infringing the public treaty of marriage are void, n. ibid.
12. So a covenant before marriage to releaſe the wife's guardian of all meſne profits within two days after ſet aſide 158
Grants and releaſes to guardians, &c. ſet aſide, n. ibid.
13. Lands were deviſed to *J. S.* paying the heir 20,000 *l.* within twenty years by 1000 *l. per annum.* The heir entered for nonpayment as a forfeiture, and the deviſee relieved 156
14. For wherever equity can give ſatisfaction for breach of a condition, they can relieve againſt a forfeiture *ibid.*
15. And that for every 1000 *l.* not paid, the heir or legatee ſhall have intereſt from the time it was payable *ibid.*
16. And no deduction for any taxes, becauſe it is not to iſſue or ariſe out of the lands, but 1000 *l. per annum* is given as a ſum in groſs 156
17. A legacy is generally to be taken as a free gift, and not as a payment of debt *Page* 155. 508
18. A legacy to a creditor greater or leſs than his debt, how to be taken *ibid.*
19. Payment of intereſt to a ſcrivener on a mortgage is good, if he has the bond or mortgage-deed 157
20. And ſo is payment of the principal on a bond, if he deliver up the bond *ibid.*
21. But it is otherwiſe of a mortgage, for there he has authority only to receive the intereſt *ibid.*
22. And if the mortgagee agree it is good during his life, though the ſcrivener has neither bond nor deed *ibid.*
23. And ſo it is after his death if the executor agrees either expreſsly or by implication *ibid.*
24. A mortgage does not revoke a will *in toto*, but ſevers the joint-tenancy of the truſt of a term 158
25. That a joint-tenancy is an odious thing in equity *ibid.*
26. Merchants goods in the hands of a factor not liable to debts of a ſuperior nature 160
Goods in the hands of a perſon as an executor-truſtee, &c., are not affected by his bankruptcy or an execution againſt him, n. ibid.
Nor money, where it can be ſpecifically diſtinguiſhed, id. ibid.
27. Otherwiſe of money in the factor's hands 161
28. Executor muſt pay debts of a higher nature after a decree *quod computet*, not after a final 507
29. Injunction againſt pulling down a caſtle granted againſt tenant for life diſpuniſhable for waſte 161
30. Bill there to foreclooſe a mortgage admitted, though the lands lay out of the juriſdiction of the Court 404
31. *Non-performance* of a condition precedent to the taking of an eſtate not relievable there; *aliter* if *forfeited* 231, 232
32. Chancery *agit in perſonam*, though lands be *extra juriſdictionem* 404
See alſo *Charitable Uſes, Deviſes, Mortgages, Truſts, &c.*
Chaplain.

Chaplain.

1. The king's chaplain extraordinary not capable of a plurality within 21 *H.* 8. *c.* 13, 14. *Page* 161
2. A diſpenſation is not neceſſary where the king preſents his chaplain to a ſecond benefice *ibid.*
3. A chaplain extraordinary has no waiting time, *&c.*, but only his name entered in the book of chaplains 162
4. A chaplain within 21 *H.* 8. muſt be retained under ſeal, *&c.* *ibid.*

And ſee *Parſon, Vicar and Curate.*

Charitable Uſes, &c.

1. To a bill for charitable uſes all the tertenants need not be made parties 163
2. Deviſe of lands to charitable uſes not in writing, or not having three witneſſes, is void *ibid.*
3. And the ſtatute 43 *El.*, which favoured appointment to charities, is repealed *pro tanto* by the ſtatute of frauds *ibid.*
4. Deviſe to ſuperſtitious uſes is void, but neither the king nor the heir ſhall have it *ibid.*
5. But the king may apply it to a proper uſe, *i. e.* as a charitable deviſe *ibid.*
Deviſe to charitable uſes void, n. ibid.
6. No averment can be admitted of a ſuperſtitious uſe by the ſtatute of frauds 162
7. But deviſes in truſt for ſuperſtitious uſes are diſcoverable by informations in the *Exchequer* *ibid.*
8. The ſtatute of frauds did not bind the *king* as to appointment of ſuperſtitious uſes, *&c.* 162, 163
Qu. per Lord Hardwicke, n. ibid.

Churches, Chapels, Churchwardens, &c.

1. One that only occupies lands in a pariſh is taxable in a rate for bells, *&c.* 164
2. Inhabitants of a chapelry are liable to repairs of the mother church, unleſs exempt by cuſtom *Page* 164, 165
3. *Aliter* where it is a late erection in eaſe and favour of thoſe of the chapelry 165
4. By the common law the pariſhioners are to repair the church, but by canon law the parſon 164
5. The pariſhioners are bound to repair the church, but the chancel is to be by the parſon *ibid.*
6. But in *London* the pariſhioners repair both church and chancel, though the freehold is in the parſon 165
7. Church rates are to be aſſeſſed by the pariſhioners, and not by the churchwardens (*vide Fareſt.* 69.) *ibid.*
8. Union of churches was at common law, *i. e.* by concurrence of the parſon, patron, and ordinary *ibid.*
9. But union of pariſhes is by ſtatute. *Vide* ſtat. 22 *Car.* 2. *c.* 11. *&c.* *ibid.*
10. By union of churches the ancient church or rectory, and the incumbency, ſeem to be extinct *ibid.*
11. Entire neglect of going to church is puniſhable in the Spiritual Court 166
12. But *quære* if one is ſuable there for not going to his own pariſh-church *ibid.*
13. Return to a *mandamus* for ſwearing in a churchwarden being inſufficient, a peremptory *mandamus* was granted *ibid.*
14. Pariſhioners cannot preſcribe to diſpoſe of pews excluſive of the ordinary 167
Note contra ibid.

Church of England, *Religion, Diſſenters, &c.*

1. On information for refuſing to take on him the office of ſheriff, adjudged, diſſenters are not exempted by the toleration from doing what is neceſſary to qualify themſelves for public offices 167
2. *Ergo* not exempted from taking the oaths and ſacrament according to 13 *Car.* 2. *&c.* 167
3. For the king has an intereſt in the perſons

perſons of his ſubjects, and a right to demand their ſervice *Page* 168
4. And none can be exempted from the office of ſheriff unleſs by ſtatute or by charter *ibid.*
A diſſenter not having taken the ſacrament is not compellable to undertake the office of ſheriff, n. ibid.
5. The toleration act is a private ſtatute, and not taken notice of by the Court unleſs pleaded *ibid.* & 674
Declared by ſtatute to be a public act, n. 168
6. A licence to a diſſenting miniſter inrolled in one county does not extend to another 572, 673

Clerks of Aſſize, the Peace, &c. vide *Offices.*

Collation and *Lapſe*, vide *Advowſon, Biſhops, Preſentation*, &c.

Commiſſion, vide *Authority.*

Commitment, vide *Attachment* and *Habeas Corpus.*

Common.

1. A farmer is to be taxed for common appendant in the pariſh where the farm lies 163
2. One may preſcribe for common appendant to his cottage *ibid.*
3. How a copyholder ſhall make title to common within or without the manor 170
4. Where it is out of the manor, though he infranchiſe his copyhold the common remains 171
5. But where within the manor, it belongs to his eſtate, and infranchiſement extinguiſhes the common (2.) 171, 366

Common Recovery, vide *Recovery.*

Common Informer, vide *Indictments*, &c.

Computation, vide *Age, Day, and Term Time.*

Condition.

1. A condition made impoſſible by the act of God cannot be broken *Page* 170
2. See the nature and effect of a condition precedent 171, 231
3. An agreement that *A.* ſhall do, and for the doing *B.* ſhall pay, the latter is a condition precedent *ibid.*
The general nature of covenants, as being independent conditions precedent, or mutual, n. 171
4. But where a time is fixed for the payment, it will vary the conſtruction 113, 171
5. A releaſe of all demands will not releaſe a promiſe unbroken, or a future act 171
6. A condition is to be conſtrued as an agreement according to the intent of the parties 113, 171, 172
7. Where a condition is underwritten or indorſed, if it be void the obligation remains ſingle 172
8. But where it is incorporated, and made one with the *lien* itſelf, if it be impoſſible the whole is void *ibid.*
9. Condition to exhibit an inventory into the Spiritual Court before ſuch a day, the defendant in excuſe muſt not only plead that no Court was held, but alſo that he was there ready *ibid.*
10. Where a condition is precedent to the taking of an eſtate, *non-performance* differs from a forfeiture thereof in equity 231, 232

See alſo *Obligation.*

Confeſſion.

1. A verdict for the plaintiff ſet aſide, and judgment entered by confeſſion on the matter of the plea 173
2. After a frivolous plea judgment may be entered as by confeſſion, *aliter* if only miſpleaded *ibid.*

Confirmation.

A new charter may be uſed as a new grant, or as a confirmation 168

Conqueſt, vide *Law*.

Conſent, vide *Agreement*.

Conſideration, vide *Aſſumpſit*, and p. 422.

Conſpiracy.

1. A conſpiracy, though nothing done in purſuance of it, is an offence, and that whether it be to charge one with an offence temporal or ſpiritual *Page* 174
2. And the bare meeting and conſulting to charge falſely an innocent perſon is indictable *ibid.*
3. And in the indictment it need not be averred that the party is innocent, for to charge falſely is *tantamount* *ibid.*
Not neceſſary to ſtate falſely, n. ib.
4. The *venue* therein muſt be where the conſpiracy was, and not where put in execution *ibid.*
5. And confederacies, *&c.* are one of the articles to be inquired in the commiſſion of *oyer and terminer* *ibid.*

Conſtable and Marſhal, vide *Marſhal*.

Conſtables.

1. The High Conſtable was an officer at common law before the ſtat. of *Winton*, as well as the petty conſtable 175, 581
2. And are officers to the juſtices of peace as the ſheriff is to the Court of *B. R.* (*Q.*) *ibid.*
3. Both high and petty conſtables are removable, and the juſtices in ſeſſions are the beſt judges of that matter 150
4. A conſtable choſen at the leet is bound to ſerve under a penalty 175
5. But ſuch penalty cannot be diſtrained for, *ſans* expreſs cuſtom *ibid.*
6. Regularly he is to be choſen in the leet or turn, but may be in a corporation by cuſtom 502
7. Seſſions of the peace may appoint a conſtable *ibid.*
8. The conſtable of *A.* takes an oath (on ſale of a diſtreſs) in *B.* and held well *Page* 247
9. If a warrant be directed to a conſtable by his name, he may execute it out of his precinct 176
Qu. Whether it is neceſſary that the direction ſhould be by name ibid.
10. He is indictable for neglecting his duty required either by common law or ſtatute 380

Conſtruction of Words, &c. vide *Expoſition*.

Conſultation, vide *Prohibition*.

Contempt, vide *Attachment*, page 429.

Contracts, vide *Agreement*, *Bargain and Sale*, *Breach*, &c.

Continuance and Diſcontinuance.

1. A wrong concluſion of prayer of judgment in a replication makes a diſcontinuance 177
2. If a plea to the whole anſwers but to part, the whole plea is naught, and the plaintiff may demur *ibid.*
3. But if a plea to part anſwers only to part, it is a diſcontinuance, and the plaintiff muſt take judgment for the reſt 94, 177
4. And where the plea is only to part, if the plaintiff do not take judgment for the reſt, it makes a diſcontinuance 180
5. See where iſſue is joined to part, and demurrer to the reſidue, after divers continuances a diſcontinuance recorded *ibid.*
6. The plaintiff cannot diſcontinue after a rule for judgment for the defendant 179
Or motion for judgment as in caſe of a nonſuit, n. ibid.
7. Yet a diſcontinuance may be by leave of the Court after a ſpecial verdict, not after general 178
Not allowed in a hard action, or to let in contradictory proofs, n. ibid.
8. Statute 32 *H.* 8. *c.* 30. extends to all diſcontinuances, as well of Court as proceſs, both in inferior and ſuperior Courts 177
9. Continuances are not entered in *B. R.* till the plea roll is made up (*vide* 420.) 179
10. Out-

10. Outlawry of the plaintiff between action brought and plea pleaded, need not be pleaded *puis darrein continuance* Page 178
11. The plea *puis darrein continuance* is a waiver of the plea in bar *ibid.*
12. A *venire* returnable 23 *October*, and the *diſtringas* teſted the 24th, is a diſcontinuance 51
13. If a defendant makes a diſcontinuance by his demurrer, the plaintiff may either take judgment or join in demurrer 4
14. A demurrer in bar to a plea in abatement makes a diſcontinuance 194, 218
15. So does a demurrer to a demurrer (Q.) 219
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D

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2. Where the ſeller has the poſſeſſion of chattels, the bare affirming them to be his makes a warranty *ibid.*
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5. Default may be waived in real actions, not in perſonal *ibid.*
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2. As where a cart overturned and threw a perſon from it before the wheels of a waggon which ran over the man, and killed him, both the cart and the waggon, and all the horſes of both, are *deodands* *ibid.*
3. So if a tree fall on the branch of another tree which breaks and kills a man, both are forfeited *ibid.*
4. So if a horſe throws a man in a river which carries him down to a mill where he is killed with the wheel 220

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2. So in treſpaſs, if the defendant juſtifies on the day in *narr.*, the plaintiff may allege another day in his replication 222
3. And ſo he may in *aſſumpſit*; for the time is but circumſtance, and if the defendant force him to vary it is no departure 223
4. Nor is a varying from that which is not materially alleged any departure 222
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2. *Detinue* of charters no plea in dower after imparlance 252

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3. *Expreſſio eorum quæ tacite inſunt nihil operatur (in margine)* 233
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5. And words in a will that are good ſenſe in themſelves, are not to be tranſpoſed 236
6. And the legal ſenſe of the words is to be taken, if a contrary ſenſe be not manifeſtly implied 238
7. The word *(granted)* in a will conſtrued as if it had been, *agreed to be granted* 225
8. *Note*; Matter that cannot appear till found, when found is not to be regarded in the expoſition of wills. *Vide ſup. pl.* 4. 235
9. What words in a will give only an eſtate for life, and what a fee, without *heirs* *ibid.*

Where there is a particular eſtate deviſed, a contrary intent is not to be implied from ſubſequent words 236

The principle of raiſing deviſes by implication, n. ibid.

10. The words *all my eſtate*, in a will, paſs both the thing and all the teſtator's intereſt therein *ibid.*

Concerning the word eſtate or eſtates in a will, n. ibid.

11. So, *I give all my eſtate, right, title, and intereſt in*, &c., *and alſo the houſe called*, &c., gives a fee in the houſe 234
12. So the words, *whatever elſe I have not diſpoſed of*, will carry a fee in a will 239
13. So a deviſe to *A.* for life, and then to be at her diſpoſal, *&c.* gives an eſtate for life with power to diſpoſe in fee *ibid.*

14. See

14. See the difference between a power appendant to the eſtate, and where it is collateral *Page* 240
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16. But it ſeems otherwiſe in deviſes of chattels and perſonal eſtate, *vide ibid.* (*and* note) 238
17. A deviſe of a term of years to ſeveral ſucceſſively for life, after all are dead, the deviſor's executor ſhall have the reſidue 231
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19. But a deviſe to an infant *in ventre ſa mere*, is good, becauſe *in eſſe* 230
20. Deviſe of the rents and profits of lands to *A.* to be paid by the executors, is a deviſe of the lands to *A.* 228
21. Limitation of a term to *A.* and the heirs of his body, and if he dies *ſans* iſſue, living *B.*, then to *B.* is good 225
22. Deviſe to *A.* and *B.* and their heirs, and the longer liver of them, equally to be divided between them and their heirs, makes a tenancy in common 226, *vide* 391
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23. A contingent remainder muſt veſt during the particular eſtate, or *eo inſtante* that it determines 228, 238
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26. A deviſe to *A.* for life, and if he have iſſue-male, then to ſuch iſſue-male and his heirs; and if he die without iſſue-male, to *B.* and his heirs; *A.* has but an eſtate for life, and both remainders are contingent 224
27. *Note*; There may be a poſſibility of reverter where no remainder can be limited (*vide ſupra* N° 17.) *Page* 231
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30. Deviſe to *A.* if *B.* a ſtranger dies without iſſue, is an executory deviſe *ibid.*
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2. And coverture to avoid ſuch diſcent muſt be continual *ibid.*
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2. The firſt fine was a diſcontinuance, but it was only a diſcontinuance during the life of *B.* *ibid.*
3. For a diſcontinuance remains no longer than the wrongful eſtate that cauſes it *ibid.*
4. Nor could the ſecond fine enlarge the diſcontinuance, becauſe thereby the eſtate returned back to the conuſor *ibid.*
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4. A bare entry on another without an expulſion makes only ſuch a ſeiſin, that the law will adjudge him in poſſeſſion only that has the right, but not work a diſſeiſin *ibid.*
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6. Where a diſtreſs eſcapes, the diſtrainer cannot bring treſpaſs, unleſs ſhewn to be without his default 248
7. But if the diſtreſs dies after taken, he may have treſpaſs for damage-feaſant *ibid.*
8. Where the law gives a diſtreſs for public benefit the officer may ſell 379
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3. Any

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5. *Detinue* of charters is no plea in dower after imparlance 252
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19. Irregularity in the return thereof muſt be complained of the ſame term *ibid.*
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23. But the party himſelf ſhall not have a *certiorari*, nor allege diminution after *in nullo eſt errat.* pleaded *ibid.*
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9. For the ſheriff ſhall anſwer civilly for the faults of his gaoler, but not criminally *ibid.*

How the ſheriff ſhall anſwer for his bailiff, n. ibid.

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2. Where an eſtoppel works on the intereſt of the land, it runs with it, and is a title *Page* 276
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4. Where the eſtoppel appears on record the other ſide may demur 277
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Not, unleſs the defendant was in contempt, n. ibid.

What a ſufficient proof of their being taken upon bill and anſwer ibid.

Can only be given in evidence againſt

againſt parties, except in caſe of tolls, &c. *Page* 286, §55
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22. A goldſmith's note to pay is evidence of his having received the money 283
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24. In debt for rent, *levy per diſtreſs, & ſic non debet*, payment or releaſe is good evidence 284
25. But in debt on obligation, *&c.* if he pleads *raſure, & ſic non eſt factum*, nothing but *raſure* is evidence *ib.*
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30. Yet *A.* being cheated was admitted as a witneſs to prove the fact on the indictment 286
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3. And ſince that ſtatute the court of *B. R.* may diſcharge the party on the inſufficiency of the return 293

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5. An *excom. cap. pro quibuſdam cauſis ſubtraction. decimar. five al. jur. eccleſiaſt.* quaſhed for uncertainty *ibid.*

6. So the recital of the *ſignificavit* therein being *in quodam negotio puerorum educationis*, it was alſo quaſhed for incertainty 294

7. One taken on an *excom. cap.* cannot come into court but by *habeas corpus*, and that not before the return of the proceſs *ibid.*

8. And if brought in before the *excom. cap.* is returnable, he can neither plead nor move to quaſh the writ *ibid.*

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2. Neceſſary expences to be allowed are only the coffin, bell, parſon, clerk, and bearers fees *ibid.*

A court of law will allow 10 l. *a court of equity more, according to circumſtances*, n. ibid.

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10. And where the executor dies, the will not proved, the Spiritual Court grants an immediate adminiſtration, and not *de bonis non* 304
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14. But if the other then renounces, the teſtator is dead inteſtate *ibid.*
15. Yet where ſeveral are executors, and one only refuſes, his refuſal is void 307
16. And where the refuſing executor ſurvives, adminiſtration granted during his life is void (Q.) 307, 308, 311
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17. So where an executor adminiſters, and after refuſes, adminiſtration cannot be granted during his life 308
18. An obligor made co-executor refuſes and dies before the others who adminiſtered, the debt is extinguiſhed *ibid.*
19. The executor of an executor may renounce being executor to the firſt teſtator; but if he does not, he is executor of courſe 309
20. If an executor proves the will, and after dies inteſtate, his adminiſtrator cannot be executor to the firſt teſtator *ibid.*
21. But in that caſe a debtor being executor, and the debt thereby once extinguiſhed, though his adminiſtrator cannot continue the executorſhip, that inability will not revive the debt *Page* 309
22. Yet where a debtor is made executor, the debt is aſſets 306
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23. For in that caſe the debt is extinguiſhed not by way of releaſe, but as a legacy 303
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24. An obligor is made executor and adminiſters part, but dies before probate, the debt is extinguiſhed, and the adminiſtrator *de bonis non* can have no action for it (Q. of creditors) 299. 300
25. So where ſeveral are jointly bound, if the obligee makes one of them his executor, either ſole or jointly with a ſtranger, the debt is releaſed, though the obligor never adminiſters 300, 301
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28. *Contra* if the obligee herſelf takes the obligor to huſband *ibid.*
29. If the obligee is made executor to the obligor, and there is not aſſets, he may ſue the heir 304
An obligee made executor, but declining to act, is not prevented from ſuing, n. ibid.
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30. An adminiſtration granted *durante minoritate executoris* ceaſes at the executor's age of ſeventeen 39
31. One taking the inteſtate's goods before adminiſtration granted is an *executor de ſon tort*; *contra* if after adminiſtration granted 313
32. An executor is chargeable in the *debet & detinet* for rent incurred after his entry 317
33. But if the rent be more worth than the land, he may plead it 297, 317

34. Two

34. Two executors join in an acquittal, but only one receives the money, both are chargeable to creditors *Page* 318
35. But the actual receiver is only chargeable to legatees *ibid.*
Note concerning executors joining in a receipt or other act ibid.
36. Executor of a master of a ship cannot sue in the Admiralty for mariners wages 33
37. An executor may pay debts of a higher nature after a decree *quod computet*, but not after a final 507
38. He may have an action for a right accrued in the life of the testator 12
39. As for false return of a *fieri fa.* or other execution; *contra* of mesne process *ibid.*
40. He may bring error and reverse an attainder of treason of his testator, *per* 3 *contra Holt* 295
41. In debt for rent of a term he may plead ne assets, and that the lands are of less value than the rent, *&c.* 297, 317
42. For he cannot waive for the term only, but must waive the executorship *in toto*, or not at all 290
43. Action by two executors, where the probate was only by one, held well 3
44. In debt against him, plea that he is administrator, and not executor, is not in bar but only in abatement 296
45. In case against him, and *plene admin.* pleaded, the plaintiff must prove his debt, or shall recover but 1 *d.* damages, though there be assets *ibid.*
46. To a *sci. fa.* on a judgment against the testator, *plene admin.* not shewing how, is ill, on special demurrer *ibid.*
47. To debt on bond he pleads six judgments; this confesses assets for above five. And if the replication takes issue upon the *riens ultra* so much, it is ill 312
48. For his pleading of judgments is a confession of assets to satisfy them, and the *riens ultra*, *&c.* is not material *ibid.*
49. An executor in pleading judgments with penalties should shew how much is really due thereon *Page* 311
An executor should plead debts truly, but it is not fraudulent to confess judgments exceeding the debts, if the debts exceed the assets, n. 312
50. Where an executor or administrator is charged as assignee, the judgment is *de bonis propriis* 309
51. But where one is charged as executor, the judgment shall be *de bonis testateris*, though he might have been charged as assignee 316
52. If one executor appears on the *capias*, and the other makes default, judgment shall be against both, *de bonis test.* 312
53. And if error be brought, both must join *ibid.*
54. If the husband of a feme executrix convert goods or money, they become his, and it is a *devastavit* 306
55. A *devastavit* may be returned by the sheriff on a *fi. fa.* without a *sci. fa.* inquiry 310
56. Judgment against executor by confession or default, is an admission of assets, and he is stopped to say the contrary on a *devastavit* returned: and so is a jury *ibid.*
An executor not pleading plene administravit *admits assets*, n. ibid.
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In the spiritual court, an executor after contesting by plea a claim for dilapidations, discharged upon paying the assets in his hands, id. ibid.
57. A *devastavit* lies for the executor of an executor of him to whom the wrong was done, though not against the executor of him that did it 314
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2. Where it is neceſſary to return a *fi. fa.*, and where not, *vide* 318
3. Two *fi. fa.*'s delivered the ſame day to the ſheriff, who executes the laſt firſt, the execution is good, but the ſheriff is liable to the plaintiff in the firſt 320

The law will allow the fraction of a day, &c. *where it is neceſſary to diſtinguiſh*, n. ibid.

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6. *Note*; A *fi. fa.* abates not by the plaintiff's death 322
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9. On a judgment of *B. R.* in *Ireland* affirmed here, coſts muſt be levied by writ out of *B. R.* there 321
10. What is a diſturbance of execution on an *hab. fac. poſſeſſionem* *Page* 321
11. Writ of error is a *ſuperſedeas* to execution (not begun to be executed) as ſoon as allowed, and without notice *ibid.*

Note relative to ſtaying execution pending error, id. *Vide* 5 T. R. 669, 714.

12. The ſheriff that begun the execution ſhall end it, though his office expires 323
13. And a ſeizure of goods by the ſheriff in execution, deveſts the defendant's property, and diſcharges his perſon *ibid.*
14. Q. The biſhop's power to compel a ſequeſtration, on a return of *clericus beneficiatus*, &c. 320, 321
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2. Q. Whether the clerk of the market can diſtrain *ex officio* for uſing unlawful meaſures *Page* 327
3. *Per Holt*, He cannot have a power to eſtreat fines and amerciaments otherwiſe than as a franchiſe *ibid.*
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2. And *aſſident damna* for *aſſidunt* held well in a verdict *ibid.*
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2. *Aliter* of a reverſal by error; for there if *nul tiel record* be pleaded, and before the day to bring in the record the judgment is reverſed, it avoids the record *ab initio*, and is a *defecit de recordo* *ibid.*
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3. Debt lies for fees for executing an *elegit*, as well as an *extent* 333
4. And upon a *capias ad ſatisfac.* the ſheriff ſhall have his fees for the whole debt. (*Quære* of *elegits*.) 331

5. But the ſtatute 29 *El. c.* 4. for ſheriffs fees, does not extend to executions on ſtatutes, recognizances, &c. becauſe the judgment is not in *invitum* *Page* 332
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2. And in that caſe either treſpaſs or caſe lies, at election. See the reaſon of either *ibid.*
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3. Defendant may be amerced twice in the ſame action where there are two final independent judgments 54
4. In treſpaſs, &c. no judgment is entered *pro fine* in *B. R.* ſince the ſtat. 5, 6 *W.* 3. *aliter* in *C. B. ibid.*
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7. And the writ of covenant, on which a fine is levied, is a real action *ibid.*
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3. *A.* may loſe 100 *l.* to one, and 100 *l.* to another upon tick, becauſe ſeveral contracts; *aliter* if a joint contract 345
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2. And in replication, to avoid that ſtatute, continuances muſt be ſhewn *Page* 420
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5. And if the firſt writ be not returned, a peremptory rule ſhall go, and next an attachment, &c. *Page* 429
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2. *Sic utere tuo ut alienum non lædas* 22
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5. On *certiorari* to remove orders, the name of the pariſh in the writ and that in the order muſt be the ſame 452
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2. A *non proſ.* may be entered as to one defendant after interlocutory judgment, not after final *Page* 455
3. Where a defendant files bail without an arreſt, the plaintiff may be *non proſ'd* *ibid.*
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The report is incorrect quoad *hoc*, n. ibid.
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2. As where *A.* in conſideration *B.* would deliver up a bond to *C*, aſſumes to pay *B.* 30*l.*, action lies on *B.*'s delivering up the bond to *C.* *ſans* alleging notice to *A.* of ſuch delivery; becauſe intended *ibid.*
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Novel Assignment.

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2. Where the place is made material by the defendant's plea, he must shew it with certainty *ibid.*
3. If in trespass, *quare clausum fregit*, he pleads *liberum tenementum*, and issue thereon, he may shew any close that is his freehold *ibid.*
4. But if the plaintiff gives the close a name, the defendant must prove a freehold in the close so named 453

Nudum Pactum, vide *Assumpsit*.

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2. In case for stopping lights it must appear that the lights were ancient *ibid.*
3. And *consuevit* after verdict therein imports time out of mind *ibid.*
4. Tenant for years erects a nuisance, and makes an under-lease to *B.*, action against either 460
5. A *quod permittat prosternere quædam ædificia ad nocumentum*, &c., lies 458
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4. Where a peer shall depose on his oath or his honour 512, 513
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3. Condition of a bond (reciting a debt) *not to pay*, is repugnant, and the bond sing e 463
4. Bond made by *Erlin* and subscribed *Erlwin*, is no material variance 462
5. Bond from *A.* and *B.* to *H.* joint and several, a covenant from *H.* not to sue is no defeasance 575
6. A bond by a deputy to pay a certain sum out of his salary or profits is good 466, 468
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2. The king grants an office to *A. durante bene placito*, and after grants it to *B.* to commence after the death, ſurrender, or forfeiture of *A.*, the latter grant is good *ibid.*
3. Office granted at will is at the will of the king, and not of the party, and may be ſurrendered 465
4. King's tenant at will may forfeit; but there muſt be an inquiſition *ibid.*
5. Non-attendance a good cauſe of forfeiture of the office of recorder 435
6. Of removing officers at will in corporations, *vide mandamus* 8. and p. 428
7. A freehold to commence *in futuro* may be in a rent *de novo*, or in an office 466
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2. *Contra* where it is defective in the points found *Page* 469
3. *A.* tenant for life, remainder to *B.* in fee; *A.* is attainted, the king ſeizes, *B.* may enter on the king *ibid.*
4. *Aliter* if an office had found *A.* ſeiſed in fee, &c. *ibid.*

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1. Order by juſtices *reſiding in the county*, not enough, *ſans* ſaying *of* or *for* the county 474
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6. So to remove *A and his family*, or *wife and family*, becauſe too general 482, 485, 488
7. So an order reciting, *We are informed B.* is the place of legal ſettlement, is ill 473
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9. Order made on *complaint that A. is likely to be chargeable*, is not good without an adjudication 491
10. And ſuch order muſt be made on complaint of the churchwardens (*Q.*) 492, 493
11. But need not ſhew that he did not rent a tenement of 10 *l. per annum* *ibid.*
12. Order of two juſtices not appealed from binds the pariſh upon which it is made, till a new ſettlement is gained 488, 489
13. And *held*, an order of two juſtices binds againſt all pariſhes till repealed 481, *vide* 524, 527
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15. Where juſtices may remove to or from extraparochial places, *vide Page* 486, 487
16. The pariſh on whom an original order is made cannot remove till it be reverſed 488
17. And the ſeſſions on appeal cannot ſend to a third place not party 475
18. Nor can the ſeſſions after their firſt order make an order of review (vide *Seſſions*) 477
19. And an appeal from order of corporation juſtices muſt be to the ſeſſions of the county, not of the corporation 490
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21. After order confirmed on appeal, if a perſon goes to a pariſh not party, he muſt be removed by original order 481
22. *Note*; An order reverſed is final only between the parties; but if confirmed, or not appealed from, it is final to all the world 492, 524, 527
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26. Payment of pariſh-rates, either for houſe or perſon, makes a ſettlement 478
27. Where and what notice on other accounts is neceſſary to make a ſettlement 472, 473, 476 and *vide Poor.*
28. On *certiorari* the juſtices can only return the order *in hæc verba* 493
29. Defect of an order cannot be made good by matter alleged in the return *ibid.*
30. See an order by two juſtices to execute another order made by others, not good 489

See alſo *Apprentices*, *Baſtards*, *Certiorari*, *Juſtices of the Peace*, *Poor*, and *Seſſions*.

Ordinary, vide *Adminiſtration*, and *Preſentation.*

Outlawry.

1. *A.* indebted to *B.* on a judgment, and to *C.* on bond, is outlawed at the ſuit of *C.* and his lands ſeized, the outlawry ſhall be preferred before the judgment (except fraud ſhewn) *Page* 495
2. One outlawed for a miſdemeanor only, cannot be thereon fined for the fact 494
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Proof, vide *Evidence* and *Witneſſes.*

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1. A man has the property of things *feræ naturæ*, that are killed in his own ground 559
2. So one that has *libera piſcaria* has property in the fiſh (*& Co. Lit.* 122 denied) 637, 357 *Q.*
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5. Plea of taking by diſtreſs for rent does not confeſs property, *&c. vide* 640

Q.

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1. A *Quantum meruit* for meat, drink, *&c.* laid uncertain as to time, yet well *Page* 557
2. So the word *quantum* omitted in the count, yet well, for *tantum* ſupplies it 557
3. A *quantum meruit* is to be taken according to the intent of the parties 558
4. In *quantum meruit* motion for bringing money into court, ſometimes granted and ſometimes denied 597
5. *Quantum meruit* lies for ſerving as a commiſſioner on a commiſſion to examine witneſſes 339

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1. In *quare impedit* the plaintiff declares on agreement by indenture between joint-tenants to preſent by turns 43
2. And ſee how a compoſition or agreement to preſent by turns may be made *ibid.* 44
3. In caſe of a prerogative turn the writ is general, *quæ ad noſtram ſpectat donationem* 556
4. It is ſufficient to lay a ſeiſin *tempore pacis tempore domini regis* 561
5. In a *quare impedit* nonſuit after appearance is peremptory 559

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2. In making title, the commencement of particular eſtates muſt be ſhewn 562
3. A diverſity therein between counts and avowries *ibid.*

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Recognizances, Statutes, Elegits, &c.

1. RECognizances in *B. R.* though taken at a judge's chamber, muſt be declared on as if taken in court *Page* 564, 659
2. But *aliter* in *C. B.*, for there it is to be declared on as taken at his chamber *ibid. vide* 600, 659
3. Recognizance of bail in *C. B.* binds from the caption, but in *B. R.* from the entry only 600, 659
4. No *ſuperſedeas* to a *certiorari* for removing an indictment, unleſs recognizance entered into of 20 *l.* 600, 659
5. The conuzee of a ſtatute cannot aſſign his intereſt after extent and *liberate*, if the conuzor continues in poſſeſſion 563
6. On *elegits*, if the ſheriff deliver more than a moiety, the execution is void *ibid.*

Separate lands may be extended, n. *ibid.*

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1. In eſcape the plaintiff did not allege the commitment, *prout patet per recordum*, but well on a general demurrer 565
2. On a *certiorari* the very record is returned *(vide Certiorari)* *ibid.*
3. On *nul tiel record* pleaded of a record of the ſame court, day may be given for the party to bring it in, or for the juſtices to inſpect it, but the defendant cannot demur 566
4. A printed ſtatute not evidence upon *nul tiel record* pleaded *ibid.*

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5. Act of the court upon record may be altered the ſame term, but of the party not 566, 567
6. Roll of a precedent term ought to be filed before motion to make it a *conſilium* *Page* 565

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Private acts of parliament are now uſed for this purpoſe, n. ibid.

2. To *A.* and *ax.* for life, remainder to the heirs males of *A.* on the wife begotten, *A.* cannot dock this remainder during his wife's life 568

Note concerning the freehold being veſted in the tenant to the præcipe ibid.

3. In a recovery the tenant to the *præcipe* was made by a fine, which was after reverſed, yet good *ibid.*
4. And if the tenant gains the freehold at any time before judgment, it is good *ibid.*
5. Alſo non-tenure is cured by a ſubſequent purchaſe 569

It is ſufficient if the tenant acquires the freehold before the end of the term in which the recovery is ſuffered, n. ibid.

6. To *A.* and the heirs of her body, by one of the name of *Searle*, is an eſtate tail 570
7. A condition that runs with the land cannot be barred by recovery; *aliter* of a condition collateral *ibid.*
8. Tenant in tail and he in remainder may be vouched jointly 571
9. If the tenant vouches a ſtranger, who vouches tenant in tail, and he enters into warranty, it is good 571
10. And tenant in tail coming in as vouchee, comes in in privity of all eſtates he ever had *ibid.*

See alſo *Fines*, *Uſes*, and *Truſts*.

Recuſants, vide *Church of* England.

Refuſal, vide *Tender*, &c.

Releaſe and Defeazance.

1. A defeazance muſt contain *proper* words of defeazance, &c *Page* 575
2. Covenant not to ſue for a certain time, is not a releaſe or defeazance 573
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3. Bond from *A.* and *B.* to *C.* joint and ſeveral, a covenant from *C.* not to ſue *A.* is not a defeazance 575
4. One deed not to be conſtrued as a defeazance of another, without neceſſity *ibid.*
5. A releaſe of all demands to the perſonal eſtate of the inteſtate, releaſes not a bond before judgment and execution *ibid.*
6. Where one releaſes his right he cannot purſue his action or remedy 422
7. But if he has a right and ſeveral remedies, the diſcharge of one remedy diſcharges not the other *ibid.*
8. Where a *proviſo* goes by way of defeazance of a covenant, it muſt be pleaded on the other ſide 574
9. But otherwiſe, where it is by way of explanation or reſtriction of the covenant *ibid.*
10. A growing rent is not releaſed by a releaſe of all demands 578
11. One bound to releaſe on payment of money, is bound to releaſe on tender and refuſal 75

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1. Every remainder is to veſt during the particular eſtate, or *eo inſtanti* it determines 228
2. And a right of entry muſt be preſently upon the happening of a contingent remainder 577
Note concerning the union of the remainder with the particular eſtate ibid.
3. A right of entry will ſupport a contingent remainder, but right of action not 576
4. Surrender of tenant for life, being *non compos* to a remainder-man, is void, and cannot bar a contingent remainder *ibid.*
5. *A.* tenant for life, remainder to his wife for life, remainder to his 1ſt, 2d, ſons in tail, remainder to *A.*'s right heirs; *A.* commits treaſon, and then has a ſon, and is then attainted; the contingent remainder to him not diſcharged by veſting in the crown during his life, becauſe the wife's eſtate is ſufficient to ſupport it *Page* 576
6. A remainder may be of a rent *de novo* 577

See alſo *Deviſes*, *Grants*, and *Reverſions*.

Remedies, vide *Actions in General*, *Releaſe*, *Rights*, &c.

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2. When awarded, the parties are to begin *de novo* at the firſt fault *ib.*
3. If denied where grantable, or granted where it ſhould be denied, it is error *ibid.*
4. Where a defendant makes default at *niſi prius*, no judgment can be for him, nor repleader awarded 216
5. Repleader cannot be where a treſpaſs is confeſſed 173
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Replevins, *Avowries*, and *Homine Replegiando.*

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2. Bailiff of a hundred cannot grant replevins out of court 580
3. Clerk of the county court granted a replevin without bond or ſurety to proſecute 467
4. The ſheriff in replevin cannot return that the cattle, &c. were not taken 581
5. But after *elongata* returned and *withernam*

withernam awarded, the defendant may plead *non cepit* *Page* 581
6. Upon pleading *non cepit* or claiming property, the defendant ſhall have his goods again *ibid.*
7. So in a *homine replegiando* he ſhall be bailed on a *non cepit* *ibid.*
8. But on *elongata* returned therein, if he pleads *non cepit*, no *withernam* ſhall iſſue 582
9. And in *homine replegiando*, the defendant cannot be bailed before return of the *withernam* 582
10. Alſo the plaintiff is demandable on return of the *withernam*, and may be nonſuit for not appearing *ibid.*
11. And there may be a new *capias in withernam* after the defendant had been bailed on the firſt 582
12. For a *withernam* is only meſne proceſs, and not an execution *ibid.*
13. Want of addition not pleadable to a *homine replegiando* or replevin 5
14. In replevin property in a ſtranger is pleadable in bar or abatement, (vide *Abatement*) 3, 5
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17. Second deliverance is a *ſuperſedeas* to the *retorno habendo*, but not to the writ of inquiry 95
18. In a plea in bar of tender of rent in replevin, Q. If the money is to be brought into court, *vide* 583, 597
19. But ſee the reaſon why it ſhall 58
20. And therein *de injuria ſua abſque hoc quod fuit in aretro*, amounts to the general iſſue 583
21. *Note*; The command or authority in replevin is not traverſable 409
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1. If *A.* requeſts *B.* to take goods, and *B.* does it, *&c. A.* is a treſpaſſer *Page* 409
2. Condition to do an act at the end of ſeven years on requeſt, requeſt muſt be made on the laſt day 585
3. Where a requeſt of departure, *&c.* is neceſſary to make one a treſpaſſer 641

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1. Attachment for a reſcue is never granted upon affidavits 586
2. But a reſcuer may be diſcharged on affidavits *ibid.*
3. The fine for a reſcue is four nobles on each offender *ibid.*
This rule exploded, n. ibid.
4. A return, that the bailiffs had him in cuſtody of the ſheriff, and that *A.* reſcued him out of the cuſtody of the bailiffs, is ill, for repugnancy *ibid.*

See alſo *Arreſt of Body.*

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1. Writ of reſtitution lies not againſt any that are not parties to the record 589
2. Where money recovered in a judgment appears by record to be paid, reſtitution ſhall be *ſans ſcire facias* 588
3. But otherwiſe where it appears to be only levied *ibid.*
4. So where judgment is ſet aſide after execution for irregularity, there needs no *ſcire facias* for reſtitution *ibid.*
5. Reſtitution denied upon quaſhing an inquiſition of forcible entry, a leaſe for years ſtanding out *ibid.*
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1. *Attach. feci* is good in a return, and

and ſurpluſage in a return rejected *Page* 589
2. Proceſs whereon to ground a *teſtatum* is returned by the attorney of courſe *ibid.*
3. A return of a *certiorari* by clerk of the peace is ill 479
4. Eight days to be between the *teſte* and return of a *ca. ſa.* againſt the principal, in order to charge the bail 599, 602

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1. *A.* ſeiſed of lands *a parte materna*, limits ſeveral eſtates with remainder to the uſe of his right heirs, the heir *a parte materna* ſhall have it 590
2. For it is the ancient uſe, and therein no difference between an expreſs and implied uſe *ibid.*
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Riots, Routs, and *unlawful Aſſemblies.*

1. Both an unlawful aſſembly, and an unlawful act done, are neceſſary to make a riot, *vide bis* 594
2. *Ergo*, If three or more aſſemble lawfully, though they quarrel and fall upon one of their company, it is no riot 595
3. Yet in this caſe, if they fall upon a ſtranger, it is a riot, but in thoſe only who concur *ibid.*
4. Indictment for a riot and aſſault, acquittal of the riot, is alſo of the aſſault 593
5. To an inquiſition of a riot upon view, the ſheriff muſt be party *ib.*
6. But if the rioters diſperſe before the view, the juſtices may make the inquiſition without him *Page* 593
7. And ſuch inquiſition by two juſtices *capt. pro domino rege* is well, and need not be *pro domino rege & corpore com.* *ibid.*
8. Yet all inquiſitions by grand jury are to be *pro corpore com.* as well as *pro domino rege* *ibid.*
9. Juſtices not inquiring within the month, are puniſhable; yet they may inquire after *ibid.*
10. If ſeveral make a riot and a man is killed, they are all principals in the murder, *vide* 334, 335

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1. Defeating a rule of court, though by a ſtranger, is a contempt, *vide* 176, 177, 596
2. A rule of court is to be conſtrued largely for his benefit for whom made 596
3. Yet ſee the expoſition of a rule to put off a trial *ſuper ſolutione cuſtag.* 83
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5. And ſee breach, *&c.* of rules of reference to three foremen, *bis* 73 and 84
6. Alſo the practice of ſtriking juries on rules of court 405
In what caſes goods may be brought in in trover, n. ibid.
7. And in what caſes rules ſhall be to bring money into court 583, 597, *and note.*
8. Where executor or adminiſtrator ſues, money is not to be brought into court, becauſe they are not liable to coſts 596
It may be paid in whereby executors loſe, but do not pay ſubſequent coſts.
9. Though the plaintiff (in other caſes) is nonſuit, yet he ſhall have money brought in, on ſtriking it out of the declaration 597
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Rules of Law, vide *Maxims*.

S.

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1. IN the caſe of the king, there needs not any *ſcire facias* after the year *Page* 602
2. See the rule for ſuing out and returning *ſcire facias* in *B. R.* and how it differs from *C. B.* 599
3. Fifteen days incluſive to be between the *teſte* of the firſt, and return of the laſt *ibid.*
4. And eight days between the *teſte* and return, when againſt the principal, in order to charge the bail 602
5. If againſt the principal, the writ is *in hac parte*; if againſt the bail, *in ea parte* 599
6. A *ſcire facias* againſt bail in *B. R.* muſt be brought in *Middleſex* only; *aliter* in *C. B.* 564, 600
7. A *ſcire facias* againſt bail muſt lie in the ſheriff's hands a convenient time 599
It muſt lie four days before the return, n. ibid.
8. A *ſcire facias* on recognizance of bail aſſigning breach that the defendant did not pay nor render *Priſonæ Mar. Mareſch. noſtræ* 602
9. Whether a *ſcire facias* lay in perſonal actions before *Weſt.* 2. and Lord *Coke*'s opinion doubted 600
10. In error to reverſe a fine, why it is needful to a *ſcire facias* againſt the tertenants, as well as the conuzees 598
11. A return of *ſcire feci* againſt tertenants ought to be of all the tertenants *in balliva ſua* *ibid.*
Where ſci. fa. *ſhall iſſue upon motion, and where without* 598
and note.
12. A *ſcire facias* lies on a judgment in ejectment, and may be general againſt all the tertenants, or particular, and name them 600
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1. Service by doing ſuit to the court of the manor twice a year, held well 604
2. A manor-court to inquire into rents and ſervices arrear, may be *bis in anno* *ibid.*
3. And the ſuit to ſuch court ſhall be intended by reſervation, before the ſtatute *quia emptores*, &c. *ibid.*
4. Alſo one that is reſiant may be bound to do ſuit real *ibid.*
5. For it ſhall be intended a ſuit-ſervice reſerved on creating the tenure *ibid.*

Seſſions General and Quarter.

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2. Seſſions cannot be entered as ſitting three days together, but muſt be an adjournment 494, 605
3. An order of ſeſſions quaſhed becauſe it concerned one of the juſtices named in the ſtyle of the court 607
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For what purpoſes they can order the county ſtock to be applid, n. ib.
5. They may alter and ſet aſide their own orders the ſame ſeſſions 494, 606
6. So their order for one to relieve his father till ſeſſions order the contrary, is good 534
7. A ſpe-

7. A ſpecial order of ſeſſions ought not to conclude to the opinion of *B. R.* *Page* 486
8. They may affirm or quaſh, but not ſuperſede an original order 472
9. They cannot ſuppreſs an alehouſe licenſed, unleſs for diſorder 470
10. They may make an original order to diſcharge apprentices 491
11. Their power extends only to ſuch trades as are named in the ſtatute (*vide* Apprentices) 471
12. They are proper judges whether fit to oblige one to take an apprentice or not 491
13. Orders on 43 *Eliz. c.* 2. muſt be be ſaid *ad quarterialem ſeſſionem, &c.* 474, 476
14. Orders on two different ſtatutes muſt be diſtinct 487
15. Seſſions on appeal cannot ſend to a third place nor party 475
16. And one ſeſſions on appeal cannot refer a matter to be determined by another ſeſſions, *bis* 477
17. If the firſt order be naught, no ſubſequent order on appeal can make it good 482
18. And where they quaſh an order, it muſt appear to be on appeal 479
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20. And to the firſt ſeſſions after notice to the father, of the firſt order 480
21. Appeal from an order of corporation juſtices, muſt be to the ſeſſions of the county, not the corporation 490
22. Seſſions cannot annex pariſhes, but may order one pariſh to contribute to the poor of another 480, 481
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24. And they may make, or order the churchwardens, *&c.* to make a new rate *ibid.*
If the objection is to the general rule and proportion of the rate, or the omiſſion of particular perſons, the ſeſſions cannot amend, but muſt quaſh or confirm it; ſecus *where the appellant is overcharged*, n. ibid.
25. Seſſions may appoint and remove high and petty conſtables, and are the beſt judges of the matter *Page* 150, 502
Vide *Conſtables.*
26. Upon appeal from allowance of overſeers accounts, the ſeſſions muſt execute their judgment in the ſame manner as two juſtices ought to do 533
27. Seſſions being but one day in law, may alter their judgment and make a new order, but muſt certify only the latter 494
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The ſheriff is not liable to an action for refuſing to liberate the defendant thereon, n. id. ib.
2. A ſheriff fined and committed for delivering to an infant a writ of appeal brought by his *prochein amy* 177
3. What fees are due to the ſheriff on execution of writs, and his duty therein, *vide Fees* and *Execution*; and for his duty in taking bail, ſee *Bail* 17, 18, 19, *&c.*
4. A ſheriff is the officer of *B. R.* in the ſame manner as conſtable to juſtices of the peace, *Q.* 175

See alſo *Church of England.*

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Statutes in General, and their *Expoſition.*

1. Where a ſtatute gives or creates a *right*, the party of conſequence

shall have an action at law to recover it *Page* 415
2. Where a ſtatute creates an offence, no remedy can be purſued, but what the ſtatute gives 460
3. Where a ſtatute introduces a new law, by giving an action where none was before, *&c.* the plaintiff need not conclude *contra formam ſtat.* 505
4. *Aliter* where it gives the ſame action with a difference of circumſtances, as double damages, *&c. ibid.*
5. Where a ſtatute gives penalty to be recovered before juſtices, and preſcribes no method, it ought to be by bill 606
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7. Where a ſtatute gives a penalty to a ſtranger, and he ſues, he is a *common informer*; *aliter* if to the party grieved 30
8. Where a ſtatute directs things of a public nature, *may* is to be taken as *ſhall* 609
9. Where it makes an offence felony, acceſſaries *(properly)* are within it, though not named 542, 543
10. *Aliter* where an offence at common law is thereby only made more penal *ibid.*
11. Though the title is no part of the ſtatute, yet if ſet out wrong it is fatal 609
Obſervations concerning the miſrecital of ſtatutes, n. ibid.
12. That the ſtatute 5 *Eliz.* is a hard law 613
13. *Ergo*, the exerciſing a trade by others is within that ſtatute 610
14. Yet following a trade ſeven years is ſufficient, *ſans* binding, *&c.* (*vide* Apprentices) 613
Vide n. ibid.
15. Where a trade is averred to be ſo at the time of making the act, the court will intend it within the act, *bis* 611
Trades mentioned in the act need not be averred to be uſed at that time, others muſt, n. ibid.
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17. One may let coach-horſes and coach-man without licence, on 5, 6 *W. & M. c.* 22. *Page* 612
18 Debt on the ſtatute 10 *W.* 3. *c.* 2. for making buttons of wood *ibid.*
19. See the conſtruction of the ſtamp-act, where a bond and warrant of attorney were on the ſame paper *ibid.*

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Surrender.

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2. When both parties meet at the time and place, he that pleads tender muſt alſo plead refuſal 623
3. And if the defendant be abſent, the plaintiff muſt ſhew *that*, and that he was there at the time, and tendered *ibid.*
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6. To a general *aſſumpſit*, tender, &c. muſt be pleaded with a *tout temps priſt*, which cannot be after imparlance 622
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5. *Sundays* and Holidays are computed for acts done out of court 624
6. But *Sundays* are not included in the four days to move in arreſt of judgment 625
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2. Where a traverſe ought to conclude to the country, and where with an averment 4
3. A conſideration executory is traverſable, *ergo* a *venue* muſt be laid 22
4. In replevin matter ſuggeſted for a return in a plea in abatement, is not traverſable 93
5. Where traverſe of the command is ſufficient in treſpaſs or replevin, but not in *clauſum fregit* 107
6. And ſee a difference in traverſes on avowries, and declarations in debt, *&c.* 562
7. That which is immaterial is not admitted by not being traverſed 561
8. Where a traverſe goes to the matter, all before is waived; *aliter* where to time only *Page* 642
9. Traverſe of an inquiſition of forcible entry is a *ſuperſedeas* to the reſtitution 587
10. In *aſſumpſit* ſatisfaction pleaded, iſſue on the acceptance is good 627
11. *Non antea* is no traverſe, where further matter muſt be diſcloſed before he can conclude to the country 628
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13. *Abſque hoc*, that he ouſted him *de premiſſis*, goes to every part 629
14. On pleading a ſeiſin generally, traverſe may be taken that he is ſole ſeiſed *ibid.*
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8. *Aliter* where an alien is indicted, if *naturalis*, *&c.* be therein *ibid.*
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10. *Aliter* where the treaſon conſiſts in ſuch act *ibid.*

11. Words of perſuaſion or of conſultation only, an overt-act of treaſon in compaſſing the king's death *Page* 631
12. Indictment for levying war, or adhering to the king's enemies in general, *ſans* ſhewing particular inſtances, not good 634
13. Joining with rebel ſubjects of the king's ally, fighting under the command of an enemy prince, is treaſon, &c. 635
14. Although ſuch fighting be directly (and only) againſt ſuch ally, for it is adhering to the king's enemies *ibid.*
15. Cruiſing is an overt-act of adhering, &c. and ſo is liſting and marching *ibid.*
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1. In a declaration in treſpaſs, *contra pacem* is ſubſtance 636
2. And treſpaſs laid in a former king's time *contra pacem* only of the preſent, is ill on demurrer, but cured by verdict 640
3. Alſo declaration in treſpaſs without *vi & armis*, held ill on general demurrer 636
4. But *quare vi & armis* is ill, for *quare* is not poſitive, but only interrogatory *ibid.*
5. Treſpaſs, *quare duos equos apud* D. &c. *& triticum de bonis proper. ipſius* A. *cepit*, held ill, becauſe the property of the horſes not ſhewn, and the conditional damages entire 640
6. And plea of taking a diſtreſs for rent does not confeſs property *ibid.*
7. Treſpaſs for entering his houſe and taking *ſeparal. claves*, &c. good *ſans* ſhewing the number 645
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9. Where matter may be laid as aggravation, for which alone treſpaſs lies not, *vide* 119
10. Diſturbing one in the uſe of his franchiſe is a treſpaſs 594
11. Treſpaſs lies for fiſhing *in libera piſcaria*, and taking his fiſh 637
Qu. *Whether ownerſhip of the ſoil is eſſential to a ſeveral fiſhery. Extracts from* 1 Inſt. *and* Harg. *notes, relative thereto. A ſeveral fiſhery does not require the excluſion of all other right if there is none co-extenſive*, n. ibid.
12. So one that has free warren, may have treſpaſs againſt any but the owner of the ſoil, for hunting there *ibid.*
13. See treſpaſs brought againſt the ſheriff's officer, for hanging a man *in private ſuo ſolo* 648
14. *Son aſſault demeſne* a good plea in *maybem* where the firſt aſſault was violent 642
15. Where in entering *A.*'s cloſe, there is only force in law, *A.* cannot lay hands on the treſpaſſer before a requeſt to depart; *aliter* where actual force 641
16. Taking cattle from *H.* is a taking from his perſon *ibid.*
17. Where the treſpaſs is tranſitory, the plaintiff cannot pretend a right to the place 643
18. *Ergo* in ſuch caſe, the defendant may juſtify by poſſeſſion only *ibid.*
19. *Note*; A juſtification muſt confeſs the treſpaſs (vide *Juſtification*) 637, 638
20. Treſpaſs for entering his cloſe and hunting, laid with a *continuando*, and held well 638, 639
21. Acts that being once done cannot be repeated, cannot be laid with a *continuando* 639
22. As treſpaſs in cutting down ſuch a number of trees cannot be continued *ibid.*
23. But a general *continuando* ſhall be be applied to what may be continued, after verdict *ibid.*
24. In treſpaſs where a traverſe goes to the matter, all before is induce-

ment, and waived; *aliter* if to time only *Page* 642
25. Treſpaſs by leſſee of a copy-holder for life for cutting down, *&c.* by the lord, held maintainable in *B. R.* and affirmed in *Cam. Scacc.* but reverſed in the houſe of lords 638
26. Treſpaſs *quare captivum ſuum cepit*, for taking a negro 666

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2. A cauſe cannot be tried at bar where the action is laid in *London*, by reaſon of their charter 644
3. A trial at bar not denied to the officers of the court, or barriſters 651
4. And in any cauſe of value or difficulty, a trial at bar may be had of common right 648
5. Alſo, where the king is party, a trial at bar may be the laſt paper-day in term 625
6. A new trial after trial at bar refuſed in ejectment, becauſe not concluſive 648, *vide* 650
Granted to the defendant, but not uſually to the plaintiff, n. ibid.
7. A new trial is rarely granted in hard actions 644, 648
Principles on which new trials are granted or refuſed—They are not granted if the verdict is agreeable to the juſtice of the caſe; or to aid a hard action or unanſwerable defence; or for a formal objection; or if there was proper evidence for the jury. They will be granted in general if the verdict is contrary to law, or a matter is left improperly to the jury; but not if there is a bill of exceptions depending, or in a writ of right. The judge's certificate is concluſive. Coſts on granting new trials, n. ib.
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10. Nor for defect of preparation 653. Or any omiſſion of the party 273, 647
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11. Nor for a miſtake in point of law; or want of notice after defence made 646
12. Indictment for a libel, defendant acquitted, no new trial *ibid.*
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15. A new trial for exceſſive damages, and the ſame damages being given, a third trial denied 649
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16. A new trial, becauſe the foreman had declared the plaintiff ſhould never have a verdict 645
Or if the jury caſt lots; but their own affidavit will not be received, n. ibid.
17. Jury after gone from the bar ſent for an act of common council given in evidence, yet new trial denied *ibid.*

18. In

18. In treſpaſs for cutting trees, verdict for defendant againſt evidence, yet becauſe the plaintiff had benefit by the cutting, new trial denied *Page* 647
19. And *Note*; No new trial can be in an inferior court 201, 650
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20. Nor any motion for a new trial after motion in arreſt of judgment 647
It may be granted for miſbehaviour of the jury, or if the court think the defendant has been improperly convicted on an indictment, n. ibid.
21. If a cauſe has been at iſſue four terms, there muſt be a full term's notice of trial 650
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22. And ſee a verdict ſet aſide for want of ſuch notice, and that rule explained 645, 650
23. Suing out a *venire facias* teſted the laſt day of term, not a proceeding within term as to notice of trial 650
24. Two days notice is to be given after *ne recipiatur* at ſittings, *&c.* 653
25. A trial is not to be put off, for that a ſuit is pending in the ſpiritual court for the ſame matter 646, 649
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27. And how a foreign matter is to be laid in the next adjacent county in *B. R.* *ibid.*
28. In what caſes the defendant may carry down a cauſe to be tried by proviſo 652
29. Trial by proviſo cannot be in the caſe of the crown, nor at *niſi prius*, unleſs by warrant from the attorney-general *Page* 652
30. When any *indictment* is removed into *B. R.* the defendant cannot carry it down to trial without leave of the Court 653
31. And on ſuch removal by the proſecutor, if the defendant comes in by proceſs, he ſhall give ſecurity to try it 652
32. A temporal incident in a cauſe in the ſpiritual court muſt be tried by the rule of the common law 547
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34. *Bills of exceptions* muſt be tendered at the trial, and ſee the nature thereof 288, 289

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Trover and Converſion.

1. Trover lies againſt a carrier for negligence, as for loſing a box, *&c.* 655
2. But not for an actual wrong, as if he breaks it to take out the goods, or ſell it *ibid.*
3. *Ergo* Denial is no evidence of a converſion, if the thing appears to be loſt by negligence *ibid.*
Vide note ibid.
4. *Contra*, If that does not appear, or if he had it in his cuſtody when he denied to deliver it *ibid.*
5. *Trover* lies not for a negro, *vide* Villeins 666
6. Trover *de ſcripto ſuo obligatorio*, good 654
7. *Trover* for 20 ounces of cloves and mace, held well, though not ſhewn how much of each, or that they were mixed *ibid.*
8. A goldſmith has lottery tickets of *A.* and *B.* and delivers *A.*'s tickets to *B.* as his own, *A.* may have trover againſt *B.* 283
The pawnee of a jeweller, &c. with whom goods were depoſited, has no heir; ſecus of the pawnee of goods obtained by fraud, n. ibid.
9. In *trover* for a horſe, bridle and ſaddle,

ſaddle, motion to bring the bridle and ſaddle into court, denied *Page* 597

10. *Trover* lies for plate generally, ſo for 260 *peciis argenti* 219

11. *Note*; A ſpecial plea in *trover* ought to confeſs a converſion 654

What ſpecial pleas in trover have been held good, n. ibid.

12. See a *demurrer* to a declaration in *trover*, *inter alia*, *de duobus fulcris* 218

13. One jointenant or tenant in common, or coparcener, cannot bring *trover* againſt his companion, but may againſt a ſtranger 290

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1. Tithes of agiſtment of barren cattle are due of common right 655

2. A county or hundred cannot preſcribe *in non decimando*, for things titheable of common right *ibid.*

3. *Aliter* of things not tithable of common right *ibid.*

4. Payment of tithes of one ſpecies, not a good *modus* for all 657

5. *Modus* of 10 fleeces of wool and 2 lambs, for all tithes, (*court* divided,) if good or not 656

6. A *modus* ſhould be as certain as the duty deſtroyed by it 657

7. A *modus* to pay 2*s*. in the pound of the improved rent, is ill *ibid.*

8. A *modus* to pay part of the very thing that is tithes, is not good, unleſs payable in another manner 656

9. *Ergo*, if to pay a whole meal's milk ſuch a day, night and morning till, &c. in lieu of tithe-milk, is ill *ibid.*

10. A ſuggeſtion in the caſe of tithes muſt be proved within ſix kalendar months of the *teſte* of the prohibition 554

11. See the caſe of a compoſition for tithes, *quamdiu ambabus partibus placuerit*, &c. 144

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V.

Vacation, vide *Term-Time*, &c.

Vagabonds and Vagrant, vide *Poor*.

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1. VARIANCE between the writ and count not pleadable *ſans* praying *oyer* of the writ *Page* 658

Oyer will not now be granted, n. ibid.

2. Variance between the *ſcire facias* and judgment, not amendable, though the writ not faulty *in ſe* 52

3. Deed dated in the year of our Lord, ſet forth with the year of the king alſo, no variance 658

4. So a bond to *A*. in 40 *l*. *ſolvend*. to his attorney, declared on as payable to *A*., no variance 659

What variances between the allegations and proofs are or not material, n. ibid.

5. So in debt on bond to perform award, omiſſion in the replication of a void part of the award, is no variance 72

6. *Aliter* if the omiſſion be of any part not void *ibid.*

7. In debt where the quantity of the duty depends on the deed, variance is fatal, and cannot be helped by *remittitur* 658

8. *Aliter* where the matter is extrinſic, and does not depend on the deed *ibid.*

9. Recognizance in *C. B.* taken at judge's chamber, pleaded as taken in court, is a variance, (vide *Recognizance*) 659

10. If error abates by motion, the court muſt be moved for execution; *contra* if for variance 264, 265

11. Writ of error was of a record *per billam*, the record returned was *per breve de privilegio*, and quaſhed 660

12. Information for a libel, variance in the word *nor* for *not*, held fatal upon evidence *ibid.*

13. In

13. In declaring for words ſpoken, variance in omiſſion or addition not material if the words proved are actionable *Page* 661
14. But otherwiſe in a tenor of words written *ibid.*
15. And in pleading a libel may be ſet forth (*in hæc Anglicana verba*) in *Engliſh*, or the ſenſe and ſubſtance of it, (Q.) *ibid.*
16. See a variance between a writ of error and a record, and refuſed to be amended, though the curſitor's note was right 49
Writs of error amendable, n. ibid.
17. See alſo variance between the writ and return in the name of a corporation 434
18. And ſee a variance in the name of a pariſh, *Waking* and *Woking* 472
See alſo *Abatement*, *Amendment*, *Error*, and *Miſnomer*.

Venue, vide *Viſne*.

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1. Declaration, for keeping a bull which uſed to run at men, not ſaying *ſciens* or *ſcienter*, held naught after verdict 662
2. For keeping a boar *ad mordend. animalia conſuet. ſcienter*, &c. held well after verdict *ibid.*
3. And uncertainty in the count or declaration, is cured by verdict 663
4. Where a verdict will aid a title defectively ſet forth, but not a defective title 364 *and* 664
5. In debt on ſingle bill, and *nil debet* pleaded, jury find *nil debet* to part, and *debet* the reſidue, held well after verdict 364, 664
6. A verdict may be taken upon any part of the declaration to which the evidence is applicable 133
7. Judgment arreſted, becauſe more damages given than ought 663
8. Damages given in treſpaſs laid at a time not come, it ſhall be intended another time was proved 662
9. No finding of a jury can diſcharge a man againſt a confeſſion by *nient dedire* 23
10. See a ſpecial verdict found on a ſingle point *Page* 249
See alſo *Evidence*, *Juror*, *Trial*.

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1. A view is grantable, but that is only where the title is in queſtion 605
2. Before the view is granted the *venire* muſt be returned, and then the rule is, that ſo many of the panel ſhall view it, &c. 665
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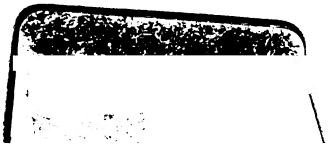
ERRATA AND ADDENDA.

Page 413. *n.* (*b*), *for* 461. *read* 361.—*col.* 4. *l.* 5. *for* days *read* day—*for* Eſpin. 401. *read* 461?
414. *n.* (*a*), *dele* Doug. 378.
421. *n.* (*a*), *for* returned *read* returnable.
430. *n.* (*b*), *for* 329. *read* 239.
465. *n.* (*a*), *for* 282. *read* 382.
489. *pl.* 51. *l.* 4. *after* him *read* from.
490. B. *l.* 4. *dele* is.
550. *n.* (*a*), *for* 76 *read* 78.
553. *n.* (*a*), *after* Powell *read* 1 Ves. 120.
566. *n.* (*a*), *for* county *read* country.
586. *for* 2189. *read* 2129.
603. *n.* (*a*), *for* 1277. *read* 1227.—*for* 1058. *read* 1048.
605. *n.* (*a*), *for* 29. *read* 59.
628. *n.* (*a*), *add* 81.